Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

MARCUS LELLAN,
Petitioner,

v.

TOMMY E. VAUGHN, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does criminal trial counsel's affirmative misadvising of Petitioner regarding the immigration consequences of a guilty plea, which actually results in adverse immigration consequences, constitute ineffective assistance of counsel despite an immigration admonition by the trial court?

2. Does the right to effective assistance of counsel encompass criminal trial counsel's competent advice on collateral immigration consequences of a plea resulting in conviction?

RULE 14.1(B) STATEMENT

As expressed in the caption, *supra*, the parties to the proceeding are:

1. Petitioner, Marcus Dellan, an individual, and

2. TOMMY E. VAUGHN, in his capacity as Warden of Chuckawalla Valley State Prison, Department of Corrections for the State of California.

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PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The instant Petition for Writ of Certiorari comes timely pursuant to the order of the Ninth Circuit Court of Appeals issued and entered May 7, 2003. (App., *infra*, 77.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1254(1) as set forth in *Hohn v. United States*, 524 U.S. 236 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant petition regards the Sixth Amendment of the Constitution of the United States, set forth, *in passim*, pursuant to the citing authorities.

STATEMENT

This case concerns the resolution of several questions which have been the cause for ongoing division, if not outright confusion, among the nation's trial courts and reviewing tribunals. To paraphrase the "Questions Presented," *supra*, what is the scope of effective counsel regarding advice on collateral immigration consequences of a guilty plea? Does trial counsel's affirmative misadvising of the defendant regarding immigration consequences constitute ineffective assistance of counsel notwithstanding an admonition by the trial court? Inclusive, it may be asked, if the burden of admonition is shifted to the trial court, what admonition is sufficient so as to meet the requirements of a voluntary and intelligent plea pursuant to *Brady v. United States*, 397 U.S. 742 (1970) and *Boykin v. Alabama*, 395 U.S. 238 (1969)? Lastly, what admonition is sufficient so as

to vitiate affirmative misrepresentations by trial counsel?

This Honorable Court has commented on the impact of deportation, regardless of its frequent characterization as a collateral consequence. Specifically, this Court has recognized that "deportation is a drastic measure and at times the equivalent of banishment or exile." (*Fong Haw Tan v. Phelan* 333 U.S. 6, 10 (1948).) Further stating that "[t]o banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later." (*Lehmann v. Carson* 353 U.S. 685, 691 (1957) (conc. opn. of Black, J.).)

The writ of certiorari should be issued due to the ongoing debate regarding these issues and the factual scenario from which this cases arises. Interestingly, the conflict among the courts, in the sense of Rules of the Supreme Court, rule 10(b), is the minority consensus of state courts of last resort in conflict with the consensus of the federal circuits. (Discussed, *infra*.) In any event, the aforementioned questions have plagued the courts and left them to ponder from which end of the looking glass the jurisprudential landscape is properly viewed. These issues cry out for resolution given the ever evolving impact of immigration consequences resulting from even the most innocuous criminal offenses. Further, the factual base upon which this case is built, though unspeakably tragic, is an appropriate setting for this Court's decision on the matter. There is no dispute that counsel misadvised Petitioner regarding the immigration consequences, there is a lengthy, yet equivocal, admonition by the trial court, and this is a case that regards the unintentional act of the "all-

American" adolescent, who happens to be an immigrant, versus a career criminal with tenuous connections to the United States. The facts permit the Court to fully address the scope of several issues that beg resolution.

The instant case hardly regards an innocuous offense. Four people were killed in the course of this incident. The unforgiving combination of youthful fervor and kinetic energy, resulting from Petitioner's speed and engagement with another vehicle, culminated with Petitioner losing control of his vehicle. Three of Petitioner's passengers were killed - including two brothers - as was a motorist in opposing traffic. Petitioner, then a high school senior, went from a largely normal adolescence to infamy as the perpetrator of a horrific automobile collision that made local, national and even international news. Pursuant to the disposition of the matter, Petitioner, a legal permanent resident of the United States since six years of age, is now the subject of removal and permanent exclusion from the only home he has known. It is undisputed that Petitioner has no contacts in the country to which he is being deported and does not speak the language. However, it remains heavily in dispute whether the immigration consequences could have been avoided through proper advocacy in the course of the underlying offense.

Pursuant to his counsel's advice, Petitioner entered an "open plea" to four counts of vehicular manslaughter and one count of reckless driving resulting in bodily injury. Petitioner's guilty plea was entered (1) without a plea bargain, (2) pursuant to counsel's advice that Petitioner would not be deported as a result of the plea, and (3) without any factual investigation by or

on behalf of Petitioner's counsel. Contrary to counsel's affirmative statements to Petitioner and the public[2] regarding Petitioner's ability to remain in the United States, Petitioner is presently subject to an immigration hold and mandatory removal and exclusion from the United States.

Though disputed[3], the "undisputed" facts are taken from

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2 The instant case garnered considerable publicity and Petitioner's counsel, James Blatt, made extensive statements to the press regarding Petitioner's culpability and ability to remain in the United States despite the charges. The following statements of trial counsel were set forth in detail in Petitioner's Traverse:

"[Petitioner's] attorney, James Blatt, said he did not believe deportation would be automatic."

"[Petitioner] 'had some justifiable reasons for staying in the country,' such as his age, family ties and unfamiliarity with the Danish language . . . .";

and,

"[F]or all intents and purposes [Petitioner] is an American."

There was no evidence introduced contradicting these statements, which were set forth as corroboration of the erroneous advice given to Petitioner. The United States District Court's analysis on the issue assumed arguendo that "Blatt was misinformed about the possibility of deportation and even misadvised Petitioner in this respect." (App., *infra*, 23.)

3 Petitioner filed extensive objections to the factual findings of the United States Magistrate Judge, as the Report and Recommendation of the United States Magistrate Judge. However, the brief statement of

the Report and Recommendation of the United States Magistrate Judge, Marc L. Goldman.[4] (App., *infra*, 1 through 4.)

At approximately 8:00 p.m. on the evening of February 17, 2000, Petitioner was driving his 1997 Acura Integra on Soledad Canyon Road in Santa Clarita, California. Soledad Canyon Road is two lanes wide in either direction and is divided by a concrete median. Including Petitioner, there were five people in the car. Daniel Weber, age 18, sat in the front passenger seat, while Timothy Lee Renolds, age 19, Daniel Richard Renolds, age 16, and Dominick Whit Ianozzi, age 17, sat in the back seats.

As Petitioner traveled westbound on Soledad Canyon Road at a high rate of speed, he came up upon two cars traveling approximately 35-40MPH. The cars were situated side-by-side, thereby blocking Petitioner's passage. Petitioner drove into the right hand bicycle lane in an attempt to pass the cars, but he lost control of his vehicle. Petitioner's car skidded across both westbound lanes, hit the concrete median and became airborne. As it descended into the eastbound lanes, Petitioner's car struck a vehicle driven by Rodney David Adams, age 45, and eventually

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facts regarding the incident is taken verbatim from the Report and Recommendation subject to appropriate grammatical corrections.

4 In accord with the considerations of the Rules of the Supreme Court, rule 10, the statement of pertinent facts is limited to the facts necessary to frame the issues in light of this Court's considerations in granting certiorari. Any briefing on the merits would entail the further factual development, of which there is no shortage in this case.

came to rest on the roof of Adam's car. Rodney Adams, Dominick Ianozzi and both Timothy and Daniel Renolds were killed upon impact. Weber and Petitioner survived the crash with minor injuries.

Petitioner was arrested on the day of the accident and charged with four counts of vehicular manslaughter, in a violation of California Penal Code § 192(c)(1), and one count of reckless driving causing injury, in violation of California Vehicle Code § 23104(a). On April 11, 2000, Petitioner entered an open guilty plea to all five counts. It is undisputed that Petitioner's counsel, James Blatt, had not attempted to negotiate a plea bargain, instead asking only that sentence be imposed by Los Angeles County Superior Court Judge Charles Peven.

Upon offering his plea, Petitioner was extensively questioned by Superior Court Judge Alan S. Rosenfield as to whether he understood the charges against him, the possible sentences he could receive, the nature of an open plea compared to a plea bargain and the consequences arising from his choice to plead guilty. Petitioner repeatedly replied that he understood his rights in that he was freely and voluntarily giving them up in order to plead guilty.

Prior to sentencing, Blatt prepared an extensive sentencing memorandum. He also submitted forty letters of support for Petitioner. In the sentencing memorandum, Blatt presented numerous factors in mitigation, including: (1) Petitioner's lack of criminal record other than speeding tickets; (2) his voluntary acceptance of responsibility; (3) his church activity; and (4) his remorse. Counsel also stated that Petitioner wanted to plead guilty

to avoid further pain and trauma to the victims' families. (Id. p. 6). While Blatt contended that Petitioner was "eligible and suitable" for probation, he suggested that two-year term of imprisonment would be appropriate under the circumstances.

A sentencing hearing was held on June 21, 2000 before Judge Charles Peven. At the hearing, both Blatt and Petitioner addressed the court. Blatt told the court that Petitioner and his family wish to express sorrow to the victims, stating that "the only thing that we can do at this time is to indicate how terribly sorry we are for your loss." Blatt also reiterated Petitioner's early acceptance of responsibility, his remorse and his desire to lessen the pain and suffering of the victims' families. Petitioner gave a brief statement as well, also articulating his remorse and excepting responsibility for his actions.

At the conclusion of the hearing, Judge Peven sentenced Petitioner to a term of eight years imprisonment. The maximum possible sentence was ten years and six months.

Petitioner did not file a direct appeal of his convictions and sentence, but later filed petitions for writ of habeas corpus in the Los Angeles County Superior court, the California Court of Appeal and the California Supreme Court. These petitions were all denied.

Petitioner filed the underlying petition for writ of habeas corpus on February 15, 2002. The petition presented three grounds for relief, all involving claims an ineffective assistance of counsel on the part of James Blatt. In ground one, Petitioner contended that Blatt was constitutionally ineffective for failing to investigate

"pertinent and available exculpatory facts." In ground two, Petitioner contended that Blatt was ineffective for failing to seek and obtain a plea bargain and for failing to offer mitigating evidence at sentencing. Finally, in ground three, Petitioner contended that Blatt "grossly misadvis[ed]" him of the immigration consequences of his plea.

The record considered by the United States District Court was comprised of the Petition, Petitioner's Traverse, Petitioner's Compendium of Exhibits, as well as Respondent's Answer and attached exhibits. Petitioner's Compendium of Exhibits contained copies of police investigation notes, the declaration of an accident reconstructionist and several press clippings. (App., *infra*, page 2, footnote 1.) Additionally, Petitioner submitted the Declaration of Alice Constantine and Don O'Neill, two known percipient witnesses to the accident who were never contacted by Petitioner's trial counsel. (These declarations are noted at App., *infra*, page 20.)

Summation of Petitioner's claims on petition for writ of habeas corpus were as follows: That Petitioner was denied effective assistance of counsel due to trial counsel's (1) failure to investigate "available and exculpatory" evidence regarding Petitioner's actual speed[5] and the role of third party factors[6] in the

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5 As set forth in Petitioner's Traverse, Objections to Report and Recommendation of the United States Magistrate Judge and Application for Certificate of Appealability, the issue of culpability in a matter of vehicular manslaughter is intensely fact specific, warranting concentrated attention to the facts surrounding the incident. (For example, see Objections to Report and Recommendation of the United

accident, (2) failure to seek a plea bargain,[7] (3) failure to introduce mitigating evidence at the time for sentencing,[8] (4)

States Magistrate Judge, Objection 8, at App., infra, pages 35-37.) However, as noted in Petitioner's Traverse, Blatt stated publicly:

> "Whether he was going as fast as that or 20 mph less, it was gross negligence. We're not here to quibble over speed."
> "Whether other people played a small role in contributing to the accident . . . [Marcus] is responsible for four deaths."

6 Contrary to the United States Magistrate Judge's interpretation of the claims in the petition, there never was an attempt to assign "culpability" to another party. Rather, Petitioner's claim of trial counsel's failure to investigate factors in the accident regarded the role of the vehicles upon which Petitioner came upon while driving down the road and the vehicle with which Petitioner was engaged while speeding down Soledad Canyon Road. This is extensively discussed pursuant to Petitioner's Objections to Report and Recommendation of the United States Magistrate Judge, Objection 4, at App., pages 29 - 32.

7 Pursuant to the Report and Recommendation of the United States Magistrate Judge, "it is undisputed that Petitioner's counsel, James Blatt, had not attempted to negotiate a plea bargain . . . ." (App., page 3.)

8 Petitioner was sentenced pursuant to his open pleas of guilty. One of the articulated factors by the sentencing court was Petitioner's alleged "willful and deliberate" conduct. To the contrary, Alice

failure to object to the highly prejudicial testimony of the Deputy Coroner *at the time of sentencing* notwithstanding the factual concession of death and the manner of death, and (5) counsel's affirmative misadvising of Petitioner regarding the immigration consequences of his pleas and conviction.

On petition for writ of habeas corpus, Petitioner argued the effect of the claims individually and collectively. It was undisputed that Blatt failed to interview any witnesses, failed to contact Petitioner's retained expert, Timothy Reust, failed to seek a plea bargain, failed to object to the highly prejudicial testimony of the Deputy Coroner, and misadvised Petitioner regarding the immigration consequences of the plea. Further, though Daniel Weber rendered statements that were highly damaging to Petitioner, there is no evidence that Blatt interviewed Weber or put him to cross-examination in the course of a preliminary hearing.[9]

Constantine and Don O'Neill, both percipient witnesses to Petitioner's demeanor of "shock" after the accident, as well as an altercation between Petitioner and several individuals who fled the scene. It is undisputed that Blatt never interviewed these witnesses. Further, Petitioner contended that any testimony by these witnesses at the time for sentencing would have had an effect with regard to Petitioner's purported callous disregard for the pleas of his passengers. See Petitioner's Objections to Report and Recommendation of the United States Magistrate Judge, Objection 6, at App., infra, pages 33-34.

9 United States Magistrate Judge Marc L. Goldman took the unsworn statements of Daniel Weber as dispositive fact; further, making the

Despite the shortcomings, individually and collectively, and the fact that Petitioner became per se deportable and was sentenced to nearly the high term for the offense, the United States Magistrate Judge found that Petitioner neither suffered prejudice nor was the subject of ineffective assistance of counsel. In each instance, Magistrate Judge Marc L. Goldman labeled Petitioner's averments "meritless" and thereby recommended the denial of relief with prejudice. (App., *infra*, page 24.)

On the other hand, it is undisputed that Petitioner was extensively questioned at the time of his plea. The dialogue of the court accepting Petitioner's plea, taken from the Report and Recommendation of the United States Magistrate Judge, is set forth as follows:

"If you are not a citizen of the United States, your

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serious accusation of Petitioner misstating the facts (App., *infra*, pages 13, 15 and 24) by presenting information in supplement and alternative to Weber's statements. Magistrate Judge Goldman accepted Weber's statements as dispositive fact despite the intense community pressure for Weber to disassociate himself with Petitioner and Weber's incredible averment that he "totally forgot" (App., *infra*, page 14, footnote 8) about the vehicle which was engaged with Petitioner's. **Had Blatt interviewed Alice Constantine and/or Don O'Neill, the information about the altercation at the scene of the accident would have revealed Weber's statements to be incredible as Weber was there.** Rather, Magistrate Judge Goldman accuses Petitioner, through his counsel, of "misstatements of the governing law and the facts of this case" (App., *infra*, page 24) and labels the claims of ineffective assistance of counsel as "meritless."

pleas of guilty can, and **I believe most definitely will result in your being deported from the country**, excluded from re-admission, denied naturalization or amnesty pursuant to the immigration laws of the United States.

"I say most probably will, because although the area of law is somewhat influx, it is – **I am advising you to expect deportation in this case**, because the court of the immigration courts and the federal courts have viewed the potential punishment as the basis for a deportation decision, not the time that you actually get in custody, because even as a condition of probation you have an exposure of 365 days in county jail. That is in the best case scenario for you as a potential offer, 365 days in county jail under a probation grant.

"**I believe that will - that will constitute the basis for deportation**, and I want you to enter this plea with the understanding that it will happen.

If you feel for any reason that this is a factor in your decision to enter the plea or not enter the plea, then I'll tell you don't enter the plea, **but I'm telling you [that] you can expect to be deported as result of this plea.**

Do you understand that? (App., *infra*, pages 22-

23, *emphasis supplied.*)

To the contrary, Petitioner's counsel stated publicly:

> "[Petitioner's] attorney, James Blatt, said he did not believe deportation would be automatic."
>
> "[Petitioner] 'had some justifiable reasons for staying in the country,' such as his age, family ties and unfamiliarity with the Danish language . . . .";
> and,
>
> "[F]or all intents and purposes [Petitioner] is an American." (App., *infra*, pages 21-23.)

As aforementioned, it was essentially conceded in the Report and Recommendation of the Magistrate Judge "that Blatt was misinformed about the possibility of deportation and even misadvised Petitioner in this respect . . . ." (App., *infra*, page 23.)

Though the trial court stated that "I say most probably will, because . . . the area of law is somewhat influx," the trial court was correct and Blatt was wrong. Therefore, Petitioner had erroneous advice from his attorney and an equivocal admonition by the trial court.

Presently, as at the time of Petitioner's plea, any alien - including a legal, permanent resident alien - who is convicted of an "aggravated felony" at any time after admission to this country is deportable under 8 U.S.C.§ 1251(a)(2)(A)(iii), (now codified at 8 U.S.C. § 1227(a)(2)(A)(iii).) The statutory definition of "aggravated felony" does not specifically include involuntary manslaughter in its list of enumerated offenses.(*See* 8 U.S.C., § 1101(a)(43).) The definition, however, encompasses a "crime of

violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." (8 U.S.C. §§ 1101(a)(43)(F).) Within the Ninth Circuit, involuntary manslaughter had been consistently held to be a deportable offense. (*Park v. I.N.S.*, 252 F.3d 1018 (9th Cir. 2001).) At the time of Petitioner's Petition for Writ of Habeas Corpus, the Ninth Circuit Court of Appeals had not addressed the issue of effective assistance of counsel with respect to advice on immigration consequences. (See discussion, *infra*, regarding *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003) [holding that effective assistance of counsel does not require advice on the immigration consequences of a plea]; Opinion filed March 18, 2003, two months prior to the Order adopting the Report and Recommendation of the United State Magistrate Judge in the instant matter. The issue of affirmative misadvice as to the immigration consequences of a plea is still unresolved in the Ninth Circuit.)

Because there was no authority in the Ninth Circuit regarding the issue of effective assistance of counsel with respect to advice on immigration consequences, Petitioner relied on the California Supreme Court's decision of *In re Resendiz*, 19 P.3d 1171 (Cal. 2001).

Resendiz, a lengthy and comprehensive opinion, evaluated the duty of trial counsel to advise on the immigration consequences of a plea, *inter alia*, in light of *Strickland v. Washington*, 466 U.S. 668 (1984), and California's mandatory immigration admonition pursuant to California Penal Code,

1016.5[10]. In *Resendiz,* California Supreme Court squarely held:

> "[T]hat the giving of an advisement under Pen. Code, [§]1016.5, does not bar a defendant who pleaded guilty from attacking his or her conviction on the ground that counsel provided inadequate advice concerning the consequences of the guilty plea. The court also held that a defendant who pleads guilty is not precluded from attacking his or her conviction on this basis, notwithstanding that immigration consequences are sometimes regarded as collateral, rather than direct, consequences of a conviction. That adverse immigration consequences may for certain due process purposes be collateral to the defendant's conviction should not preclude application of ordinary ineffectiveness standards to alleged immigration misadvice." (19 P.3d at 1183.)

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10 California's mandatory and standard admonition regarding immigration consequences is set forth pursuant to California Penal Code, §1016.5. It states verbatim:

"(a): 'If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.'"

Preceding its holding, the California Supreme Court set forth:

> "The [California] Attorney General argues, . . . , that a trial court's having provided a section 1016.5 advisement 'should shield pleas from collateral attack'. . . based on immigration consequences. We disagree.
>
> "That defendants have a right to counsel when they undertake the plea evaluation and negotiation specifically provided for in section 1016.5, subdivisions (b) and (d) is not disputed. And that right to counsel '"is the right to the effective assistance of counsel."' (*Strickland, supra*, 466 U.S. at p. 686 [104 S.Ct. at p. 2063], *italics added.*) We recognize that 'it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain.' [Internal citation omitted.]
>
> "Thus, whether or not the court faithfully delivers section 1016.5's mandated advisements, '[t]he defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.'" (19 P.3d at 1177.)

In accord with the instant facts, it is fairly asked that, when one is an adolescent who is implicated in a quadruple vehicular homicide, which authority may bear greater weight; the fleeting encounter with a trial judge, or the trusted guidance of employed

counsel? The question is fairly viewed in light of what is going through the head of an 18 year old when three of his friends have been killed, as well as an oncoming motorist, when he was behind the wheel. Does such an individual regard any rational consequence, let alone one that is couched in affirmative and erroneous advice?

The United States District Court denied Petitioner's claim, analogizing to the cases of *United States v. Thornton*, 23 F.3d 1532 (9th Cir. 1994) and *Doganiere v. United States*, 914 F.2d 165 (9th Cir. 1990). Here, the United States District Court simply held that, "[a]ny error in Blatt's advice was negated by the court's correct advice." (App., *infra*, page 23 - 24.)

Neither case cited by the United States District Court regards advice pertaining to immigration consequences. Both are cases which pre-date the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA); the very statutory scheme which put "the area of [immigration] law . . . somewhat in flux."

Consistent with the commentary of *Resendiz*, *supra*, Petitioner had a right to rely on the advice of counsel. As set forth in the Certificate of Appealability, Petitioner's authority of *Resendiz* is post-AEDPA and post-IIRIRA and explicitly deals with the issue of faulty advice of counsel in light of the sweeping changes to immigration law. Because Petitioner's authorities regarded California state application of federal law, they should have further been controlling with respect to the question of whether the state court decision was "contrary to" clearly established federal law. (*Brown v. Mayle*, 283 F.3d 1019, 1024 (9th Cir. 2002).)

Now that the Ninth Circuit has decided the issue of effective assistance of counsel with respect to immigration consequences (*United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003)), there may be unity among the federal circuits, but discord between and among the courts of last resort for the various states.

BASIS FOR ALLOWANCE OF THE WRIT

Basis for the allowance of the writ comes pursuant to Rules of the Supreme Court, rule 10(b). Specifically, the writ should be issued because:

> "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[.]"

After the decision on Petitioner's Petition for Writ of Habeas Corpus and the Ninth Circuit's denial of Petitioner's Application for Certificate of Appealability, the Ninth Circuit Court of Appeals decided *United States v. Fry*, 322 F.3d 1198 (9th Cir. 2003). *Fry* is the seminal case for the Ninth Circuit with regard to whether effective assistance of counsel contemplates a duty to advise with respect to the immigration consequences of a plea. *Fry* is in clear conflict with the holding of the California Supreme Court in *Resendiz*, *supra*. The conflict between *Fry* and *Resendiz* is illustrative of the variance between the various federal circuits and the state courts of last resort.

The *Fry* court followed the majority of federal circuits and held that effective assistance of counsel does not encompass the duty to advise on a plea's resulting immigration consequences. Specifically, citing several federal circuits, the *Fry* court set forth:

> "All other circuits to address the question have

concluded that 'deportation is a collateral consequence[11] of the criminal process and hence the failure to advise does not amount to ineffective assistance of counsel.' *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *accord United States v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992), *cert. denied*, 507 U.S. 1039, 123 L. Ed. 2d 489, 113 S. Ct. 1869 (1993); *United States v. Del Rosario*, 284 U.S. App. D.C. 90, 902 F.2d 55, 59 (D. C. Cir. 1990), *cert. denied*, 498 U.S. 942, 112 L. Ed. 2d 316, 111 S. Ct. 352 (1990); *Santos v. Kolb*, 880 F.2d 941, 945 (7th Cir. 1989), *cert. denied*, 493 U.S. 1059, 107 L. Ed. 2d 956, 110 S. Ct. 873 (1990); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985); *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975)(*per curiam*)." (*Fry*, 322 F.3d at 1200.)

Consistent with the cited circuits, the *Fry* court held "that counsel's failure to advise a defendant of collateral immigration consequences of the criminal process does not violate the Sixth Amendment right to effective assistance of counsel." (*Id.*)

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11 Discussion regarding the "collateral consequences doctrine" is properly reserved for briefing on the merits. Accordingly, it is omitted from the instant brief.

To the contrary, a survey of the courts of last resort throughout the nation reveals that there is anything but harmony on the issue. The Supreme Court of Maine, in *Aldus v. Maine*, 748 A.2d 463 (Me. 2000), viewing effective assistance of counsel with regard to immigration consequences consistent with the California Supreme Court[12], vacated the petitioner's conviction due to her attorney's failure to explore the immigration consequences of her plea. (748 A.2d at 471-72.) Specifically, **the Maine Supreme Court found that, where there had been a question by the defendant regarding the immigration consequences of proceedings, trial counsel had a duty to seek continuance of the proceedings and take action regarding the inquiry**. (*Id.*)

In reaching this conclusion, the *Aldus* court conducted an extensive survey of the present state of counsel's duties with respect to the issue of immigration consequences. The commentary, set forth in footnote 7 of the opinion, is properly set forth verbatim herein. The Maine Supreme Court observed:

> "The majority of courts that have decided the issue in the post-conviction context have concluded that counsel is not ineffective for having failed to advise the defendant about deportation. Most courts do so on the basis that deportation is a collateral consequence. See *United States v. Del Rosario*, 284 U.S. App. D.C.

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12 The *Aldus* court does not cite the *Resendiz* opinion, but does cite other California authority with respect to the issue of effective assistance of counsel as ti pertains to advice on immigration consequences.

90, 902 F.2d 55, 59 (D.C. Cir. 1990); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Campbell*, 778 F.2d 764, 768-69 (11th Cir. 1985); *Tafoya v. State*, 500 P.2d 247, 252 (Alaska 1972); *People v. Huante*, 143 Ill. 2d 61, 571 N.E.2d 736, 741, 156 Ill. Dec. 756 (Ill. 1991); *Mott v. State*, 407 N.W.2d 581, 582 (Iowa 1987); *Alanis v. State*, 583 N.W.2d 573, 579 (Minn. 1998); *State v. Dalman*, 520 N.W.2d 860, 863 (N.D. 1994); *Commonwealth v. Frometa*, 520 Pa. 552, 555 A.2d 92, 93-94 (Pa. 1989).

"Some courts, while holding that an attorney's failure to advise a defendant about potential deportation is not ineffective assistance of counsel, pronounce that it is preferable that defense counsel give advice about potential deportation. See *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *Durant v. Coughlin*, 1999 Conn. Super. LEXIS 1815, 1999 WL 528832, (Conn. Super. Ct. 1999)[13].

"**Although the majority of courts do not find ineffective assistance of counsel for failure to**

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13 *Durant v. Coughlin* is cited as part of the text of *Aldus*. Accordingly, the citation within the text is left intact and omitted from the table of authorities.

advise a defendant about deportation, there are a number of courts that do. Some take the position that an affirmative misrepresentation by counsel on the deportation consequences of a conviction is ineffective assistance of counsel. See *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994). *Cf. United States v. Russell*, 222 U.S. App. D.C. 313, 686 F.2d 35, 41-42 (D.C. Cir. 1982) (allowing defendant to withdraw guilty plea pursuant to former F.R. Crim. P. 32(d) because government incorrectly informed defendant that conviction would not subject him to deportation).

"**Other courts conclude that failure to advise an alien defendant on possible deportation consequences can be ineffective assistance of counsel.** In *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987), the Colorado Supreme Court concluded that the failure of an attorney to learn the basics of immigration law when the defendant is an alien, is similar to the failure of an attorney to research the law of the crime with which the defendant is charged. The court held that potential deportation consequences are material and the failure to investigate those consequences, when the attorney knows that the defendant is an alien, constitutes ineffective assistance of counsel. In *People v. Soriano*, 194 Cal. App. 3d 1470, 240 Cal. Rptr. 328 (Cal. Ct. App. 1987) there was

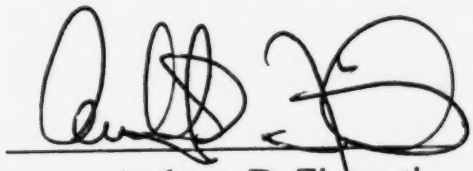
> conflicting evidence at the post-conviction hearing regarding the advice given by the attorney to the defendant. 'What is uncontested is that counsel, knowing defendant was an alien, . . . did not make it her business to discover what impact his negotiated sentence would have on his deportability.' 240 Cal. Rptr. at 335. The court concluded that the defendant was deprived of adequate assistance of counsel because he was not adequately advised of the immigration consequences. 240 Cal. Rptr. at 336." (*Aldus*, 748 A.2d at 471, footnote 7, *emphasis added.*)

Some courts have gone as far as to hold that failure to seek a recommendation against deportation constitutes *per se* ineffective assistance of counsel. (*Lyons v. Pearce*, 694 P.2d 969, 978 (Ore. 1985) [holding unconditionally that failure to request a judicial recommendation against deportation renders counsel's assistance constitutionally inadequate].) In summation, there is no consensus on whether effective assistance of counsel contemplates a duty to advise on the immigration consequences of a plea. The courts are demonstrably more divided where the issue of "affirmative misadvice" is added to the issue. Accordingly, the United States District Court was erroneous in its determination that "jurists of reason would find debatable or wrong" (*Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) the determination in the instant case, as followed by the Ninth Circuit Court of Appeal in its denial of issuance of a Certificate of Appealability.

CONCLUSION

In accord with the points and authorities on Petition for Writ of Certiorari set forth herein, Petitioner, MARCUS LELLAN, respectfully requests that this Honorable Court issue its writ of certiorari permitting this Honorable Court's review of the instant matter.

Dated: August 4, 2003



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RULE 14.1(i) APPENDIX

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Filed
Dec 12 2002
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CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY s/ "JS" DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARCUS LELLAN, Petitioner, v. TOMMY E. VAUGHN, Warden, Respondent. _____/	Case No.: CV02-01375 HLH (mlg) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Harry L. Hupp, United States District Judge, pursuant to the provisions on 28 U.S.C., s. 636 and General Order 01-13 of the United States District Court for the Central District of California.

I. Factual and Procedural History.

Petitioner, a California State prisoner, comes to this court seeking habeas corpus relief from his convictions and sentence arising from his guilty plea to four counts of vehicular manslaughter in the Los Angeles County Superior Court. The

uncontested facts reveal the following.[1] At approximately 8:00 p.m. on the evening of February 17, 2000, Petitioner was driving his 1997 Acura Integra on Soledad Canyon Road in Santa Clarita, California. Soledad Canyon Road is two lanes wide in either direction and is divided by a concrete median. Including Petitioner, there were five people in the car. Daniel Weber, age 18, sat in the front passenger seat, while Timothy Lee Renolds, age 19, Daniel Richard Renolds, age 16, and Dominick Whit Ianozzi, age 17, sat in the back seats.

As Petitioner traveled westbound on Soledad Canyon Road at a high rate of speed,[2] he came up upon two cars traveling approximately 35 - 40MPH. The cars were situated side-by-side, thereby blocking Petitioner's passage. Petitioner drove into the right hand bicycle lane in an attempt to pass the cars, but he lost control of his vehicle. Petitioner's car skidded across both westbound lanes, hit the concrete median and became airborne. As it descended into the eastbound lanes, Petitioner's car struck a vehicle driven by Rodney David Adams, age 45, and eventually

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1 These facts are derived from the Petition, the Traverse, Petitioner's Compendium of Exhibits ["COE"], as well as from Respondent's Answer and attached exhibits. Petitioner's COE contains copies of police investigation notes, the declaration of an accident reconstructionist and several press clippings, all of which will be discussed in more detail later in this Report and Recommendation.

2 Petitioner contends that he was traveling at no more than 85 miles per hour ["MPH"] at the time of the accident, while the State's accident reconstructionist expert put Petitioner's speed between 90-106 MPH.

came to rest on the roof of Adam's car. Rodney Adams, Dominick Ianozzi and both Timothy and Daniel Renolds were killed upon impact. Weber and Petitioner survived the crash with minor injuries.

Petitioner was arrested on the day of the accident and charged with four counts of vehicular manslaughter, in a violation of California Penal Code s. 192(c)(1), and one count of reckless driving causing injury, in violation of California Vehicle Code s. 23104(a). On April 11, 2000, Petitioner entered an open guilty plea to all five counts. (Reporter's Transcript of Plea, attached to Respondent's Answer as Ex. A). It is undisputed that Petitioner's counsel, James Blatt, had not attempted to negotiate a plea bargain, instead asking only that sentence be imposed by Los Angeles County Superior Court Judge Charles Peven.

Upon offering his plea, Petitioner was extensively questioned by Superior Court Judge Alan S. Rosenfield as to whether he understood the charges against him, the possible sentences he could receive, the nature of an open plea compared to a plea bargain and the consequences arising from his choice to plead guilty.[4] [sic] (Answer Ex. A). Petitioner repeatedly replied that he understood his rights in that he was freely and voluntarily giving them up in order to plead guilty. (Id.).

Prior to sentencing, Blatt prepared an extensive sentencing

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4 Petitioner was born in Denmark but had lived in the United States since the age of six. Before he accepted Petitioner's guilty plea, Judge Rosenfield specifically cautioned Petitioner that he would be deported if he pleaded guilty. (Answer, Ex. A at pp. 32-33).

memorandum. (Answer Ex. D). He also submitted forty letters of support for Petitioner. In the sentencing memorandum, Blatt presented numerous factors in mitigation, including: (1) Petitioner's lack of criminal record other than speeding tickets; (2) his voluntary acceptance of responsibility; (3) his church activity; and (4) his remorse. (Id. pp. 24-30). Counsel also stated that Petitioner wanted to plead guilty to avoid further pain and trauma to the victims' families. (Id. p. 6). While Blatt contended that Petitioner was "eligible and suitable" for probation, he suggested that two-year term of imprisonment would be appropriate under the circumstances. (Id. pp. 44-47).

A sentencing hearing was held on June 21, 2000 before Judge Charles Peven. At the hearing, both Blatt and Petitioner addressed the court. Blatt told the court that Petitioner and his family wish to express sorrow to the victims, stating that "the only thing that we can do at this time is to indicate how terribly sorry we are for your loss." (Answer, Ex. E p 152). Blatt also reiterated Petitioner's early acceptance of responsibility, his remorse and his desire to lessen the pain and suffering of the victims' families. (Id. pp. 152, 158). Petitioner gave a brief statement as well, also articulating his remorse and excepting responsibility for his actions.

At the conclusion of the hearing, Judge Peven sentenced Petitioner to a term of eight years imprisonment. (Answer, Ex. B). The maximum possible sentence was ten years and six months.

Petitioner did not file a direct appeal of his convictions and sentence, but later filed petitions for writ of habeas corpus in the Los Angeles County Superior court, the California Court of Appeal and the California Supreme Court. These petitions were

all denied.

Petitioner filed this petition for writ of habeas corpus on February 15, 2002. The petition presents three grounds for relief, all involving claims an ineffective assistance of counsel on the part of James Blatt. In ground one, Petitioner contends that Blatt was constitutionally ineffective for failing to investigate "pertinent and available exculpatory facts." (Petition, p. 5). In ground two, he contends that Blatt was ineffective for failing to seek and obtain a plea bargain and for failing to offer mitigating evidence at sentencing. (Id. p. 6). Finally, in ground three, he contends that Blatt "grossly misadvis[ed]" him of the immigration consequences of his plea. (Id.). Respondent filed an answer and Petitioner filed a traverse. The case is now ready for decision.

II. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of

1996 ("AEDPA"), 28 U.S.C. s. 2254(d)(1), a federal court may grant a writ of habeas corpus to a state prisoner with respect to a claim that was adjudicated on the merits in state court only if the state courts' decisions were " contrary to, or involved an unreasonable application of, clearly established Federal [sic] law, as determined by the Supreme Court of the United States" or if the ruling was "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts. The state court decision is "contrary to" clearly established federal law if the state court "failed to apply the correct controlling authority from the Supreme Court." *Brown v. Mayle*, 283 F.3d 1019, 1024 (9th Cir. 2002) (quoting *Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir. 2000)); *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

The Supreme Court has recently stated that a state court decision is "contrary to" clearly established Federal law if the state court "applies a rule that contradicts the governing law set forth in our [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 365, 2002 D.J. D.A.R. 12,601 (Nov. 4, 2002) (quoting *Williams*, 529 U.S. at 405-06). In addition, even if the state court decision is deemed to be erroneous under the "contrary to" clause, a petitioner must also show that the error had a "substantial or injurious effect on the verdict." *Brown*, 283 F.3d at 1024; *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

A state court decision involves an "unreasonable application of" clearly established federal law if the state court identifies the correct governing legal principle from the decisions of the Supreme Court but unreasonably applies that principle to the facts of the case. *Williams*, 529 U.S. at 407-08. Hundred is standard, a habeas corpus at issue the writ simply because that court concludes "in its independent judgment" that the state court decision is incorrect. *Woodford v. Visciotti*, ___ U.S. ____, 123 S.Ct. 357, 360, 2002 D.J. D.A.R. 12,605 (Nov. 4, 2002); *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000). The reviewing court must find that the state court decision was an objectively unreasonable application of the law to the facts, not simply erroneous decision.[5] *Id.*

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5 . The Ninth Circuit has stated that relief under the "unreasonable

Here, there is no reasoned to decision by the California courts. No direct appeal was taken and Petitioner's state habeas petitions were all summarily denied without comment. However, this does not modify the standard of review. "Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. *Van Tran*, 212 F.3d at 1153. Only by that examination may we determine whether the state court's decision was objectively reasonable." *Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). With these standards in mind, the court will review Petitioner's contentions.

III. Discussion and Analysis

To establish ineffective assistance of counsel under clearly established U.S. Supreme Court law, Petitioner must show: (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). To establish prejudice in the conviction arising from a guilty plea, a habeas petitioner must demonstrate a

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application" prong may only be granted when the court is left "with a 'firm conviction' that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous - in other words that clear error occurred." *Brown v. Mayle*, 283 F.3d at 1025 (quoting *Van Tran*, 212 F.3d at 1153-54).

reasonable probability that but for his attorney's errors, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *Langford v. Day*, 110 F.3d 1380, 1386 (9th Cir. 1996), *cert denied*, 522 U.S. 881, 118 S.Ct. 208 (1997). If the alleged error by counsel arises from the failure to investigate the potential defense prior to the guilty plea, the proper inquiry is whether "discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill* at *id.* The result of this inquiry may depend on whether "the affirmative defense would have likely succeeded at trial." *Id.*

In evaluating claims and ineffective assistance of counsel, the court's review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996); *United States v. Quintero-Barraza*, 57 F.3d 836, 840 (9th Cir. 1995); *Strickland*, supra, 466 U.S. at 690. The court must "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125 (1994). " In short, the defendant must surmount the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Quintero-Barraza*, 57 F.3d at 840 (internal quotation omitted).

A. Trial Counsel's Performance Was Not Deficient For Failing To Investigate Petitioner's Speed and Possible Third Party Culpability.

In ground one, Petitioner contends that James Blatt rendered deficient performance at the guilt phase by failing to

investigate "available and pertinent information" regarding Petitioner's speed and the possible involvement of culpable third parties in the accident. (Petition p. 5; Traverse p. 25). Petitioner further contends that the facts demonstrating Blatt's deficient performance are undisputed.[6] I find these contentions are meritless.

1. The Dispute Over Petitioner's Speed

In support of his contention that Blatt was ineffective for failing to investigate his speed, petitioner offers the declaration of Timothy Reust, an accident reconstructionist. (Petitioner's Compendium of Exhibits ["COE"] at pp. 35-36). In his declaration, Reust makes two key statements: (1) that the bicycle lane in which Petitioner passed the other cars was 7.5 feet wide,

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6 Petitioner does not request an evidentiary hearing, apparently because he feels that the fact of Blatt's misconduct is not in dispute. However, even if Petitioner did make such a request, an evidentiary hearing would be unwarranted. "To obtain an evidentiary hearing on an ineffective assistance of counsel claim, a habeas petitioner must establish that (1) his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998). To establish a colorable claim of ineffective assistance of counsel, Petitioner must demonstrate that Blatt's performance was deficient and that the deficient performance prejudiced his defense. Id. (citing *Strickland*, 466 U.S. at 687). As discussed more fully below, Petitioner has failed to demonstrate deficient performance or prejudice and thus, he fails to state a colorable claim.

and not 2.5 feet as noted by the State in its sentencing memorandum; and (2) that the state expert's conclusion that Petitioner was traveling between 90 and 106 MPH during the crash was erroneous. (Id.). The first aspect of the declaration is essentially frivolous because it is undisputed that Petitioner passed another vehicle on the right in a bicycle lane. The actual width of that bicycle lane does not increase or decrease the recklessness of that conduct. Any additional " investigation" would have been meaningless.

As for the estimate of Petitioner's speed at the time he lost control, Reust notes several errors in the State's methodology of determining the speed at which Petitioner was traveling, but he fails offer his own conclusion as to Petitioner's speed. Even assuming that Reust would have determined that Petitioner was traveling at the speed lower than 90MPH, it is a difference without distinction. Petitioner was driving far in excess of the speed limit when he attempted to passed two vehicles on the right in a bicycle lane. As stated by the sentencing judge:

> And whether he sped off, whether it's 85 miles an hour, 90 miles an hour, 95 miles an hour, 106 miles an hour, he sped off. Much speed, much excess of what - I don't know what it's posted there on that road, but much in excess of what somebody should be driving on that road and he knows that. I mean, he lives there. He knows it. He knows the area. He probably drives the road on a daily

basis. He's gotten tickets on that road for speeding.[6] He knows that road.

(Answer, Ex. E pp. 185-86). Additionally, the judge noted:

[O]n three different references in this probation report, Daniel Weber, apparently, along with others in the vehicle, told [Petitioner] to slow down. You are driving too fast. Stop. Slow down. And he didn't. Had he heeded them, Daniel Weber and maybe some of the others, he wouldn't be where he is. But he didn't, and so therefore what he did

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6 Prior to the crash, Petitioner had been cited twice for speeding on Soledad Canyon Road. On October 30, 1999, Petitioner was cited for driving 67MPH in a 50MPH zone. On January 8, 2000, just over one month prior to the fatal crash, Petitioner was cited for driving 64MPH in a 40MPH zone. Although the speed limit on the section of Soledad Canyon Road where the accident to place has not been established, Petitioner's prior tickets indicate that it is likely close to 40 or 50MPH. Indeed, under the California Vehicle Code s. 22357(a), the maximum speed allowed on Soledad Canyon Road could only have been 65MPH. Petitioner estimated his speed at between 80-85MPH at the time he attempted to pass the slower vehicles. (Probation Officer's Report ["POR"] p. 13). Thus, Petitioner was traveling at least 15-20MPH over the possible maximum, but may have been traveling at twice the speed limit at the time of the crash.

was willful and deliberate. Wasn't an accident.

(Id. p. 187). Blatt's failure to investigate or determined actual speed at which Petitioner was driving cannot be deemed deficient performance because, as the sentencing judge noted, it did not matter if Petitioner had been going 80MPH to 100MPH - his overall conduct was still reckless.

Petitioner has failed to demonstrate that additional investigation into his speed would have produced any favorable evidence or would have changed the outcome of the proceedings. His conclusory allegations as to his actual speed and the fact that proof of a lesser speed would have had on the proceedings will not suffice to overcome the presumption that Blatt's performance was objectively reasonable.

2. Failure To Investigate The Claim Of Third Party Culpability In The Accident.

Petitioner's allegation of ineffective assistance a counsel arising from the failure to investigate the alleged culpability of third parties is similarly meritless. In his traverse, Petitioner raises the claim that unnamed, unidentified "Hispanic gang members" menaced him immediately prior to the crash, therein implying that he was fleeing from these dangerous individuals when he lost control of his car. (Traverse p. 9). As detailed below, however, these claims are totally unsupported by the evidence and are not sufficient to establish a counsel was ineffective.

In his traverse, Petitioner suggests that the "gang members" who allegedly menaced him were members of "CNS," "a local Hispanic gang." (Traverse p. 9). He then speculates that these "gang members" must have been the same people had previously

scuffled with Timothy Renolds, thereby offering a possible excuse as to why he was driving recklessly. (Id.). Without offering any proof to support these allegations, Petitioner simply notes the existence of a written statement of a security guard, which mentions a parking lot scuffle between Timothy Renolds and some members of "CNS" in October 1999. (Id. n. 7; COE p. 166). However, this unsupported statement is dated October 2000, eight months after the crash and a full year after this alleged scuffle occurred. Further, it does not appear that the individual who wrote the document witnessed the alleged incident involving Renolds. Similarly, the document offers no basis to conclude that the security guard was sufficiently familiar with any of the parties involved to even identified them, let alone to identify them as gang members.

Petitioner next posits that this car full of CNS gang members menaced him (or Timothy Renolds) prior to the accident. (Traverse p. 9). In making this claim, he relies upon the notes of the police interview with Daniel Weber, the surviving passenger from Petitioner's car. As will be shown, however, Petitioner's arguments are predicated upon a misstatement of the facts which came out of that interview. Petitioner offers no concrete evidence to support his claims.

According to the interview notes, Daniel Weber's mother received a phone call on March 8, 2000 from the media asking about the possible involvement of "Hispanic gangsters" at the scene of the accident. (COE p. 12). When his mother question him about this, Weber's memory was apparently jolted because he suddenly remembered that there was a car of gang members in the area immediately prior to the accident. (Id.).

On March 13, 2000 Weber was interviewed by the police and Assistance District Attorney David Jacobs on his refreshed memory.[8] Although Petitioner contends that Weber stated that the car contained "several gang members," (Traverse p. 9), the notes read differently. The notes reveal that Weber was unable to remember the make or color of the car and was only able to say that this unknown vehicle *possibly* held some unnamed and unidentified "Hispanic gangsters." (COE p. 13).

Similarly, Petitioner claims that this car full of gang members "came to engage" Petitioner. (Traverse p. 9). However, upon questioning by DA Jacobs about the actions of the "gang members," Weber was clear that the "gang members" never threatened anyone in Petitioner's car, never brandished a weapon and never did anything else to threaten or otherwise scared the occupants of Petitioner's car. (COE p. 13). Later in the interview, Weber again stated that no threats or gestures were made by these "gang members." (Id. pp. 14, 15). Indeed, Weber described Petitioner has "messing" with the other car by preventing it from passing. (Id. p. 13).

Finally, Petitioner claims that he "sped up so as to lose the vehicle," and cites to Weber's interview notes to support this claim. However, the interview notes reveal that Weber stated that after blocking the "gang" car's passage, Petitioner " took off really

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8 When asked why he failed to mention his vehicle during the previous interview on February 21, 2000, Weber replied that he had "totally forgot about this car." (COE p. 13).

fast" for no apparent reason. (COE pp. 13, 15). Weber never indicated that Petitioner sped up to " lose" this "gang" vehicle. Indeed, Weber specifically stated that seeing the car was "no big deal," and that no one in Petitioner's car, including Petitioner, appeared scared. (Id. p. 14). At the end of the interview, Weber once again repeated that the "gang members" never threatened anyone in that it was Petitioner that was "messing" with the "gang members."[9] (Id. p. 15).

Aside from the misstatement of the interview notes, Petitioner fails to offer any declaration by any witness who can corroborate his delayed contention that this car of gang members either existed or somehow menaced him. Nor has Petitioner offered a declaration of his on detailing the circumstances running the crash. Instead, Petitioner's counsel simply offers conjecture and rhetorical questions in an attempt to prove his point.

There is actually no evidence to establish that: (1) Petitioner's assertion as to the involvement of "Hispanic gang members" is true; (2) whether anyone, including Petitioner himself, was was [sic] willing and able to testify as to the specifics of this "gang" involvement at trial; and (3) whether any investigation by Blatt would have uncovered this information. An absence of such evidence, Petitioner cannot overcome the

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9 Petitioner failed to mention any Hispanic gang members in his statements to the probation officer. (POR p. 13). To the contrary, Petitioner himself stated that he was "toying with" another car before the crash, not fleeing from mysterious "Hispanic gang members" who had menaced him or one of his passengers. (Id.).

presumption that Blatt's representation was objectively reasonable. Indeed, all Petitioner has established is that there are discrepancies in what little evidence is available.

More reportedly, though, Petitioner has not offered any indication that he would have insisted on going to trial had any of this alleged information been available when he pleaded guilty. As noted above, the show prejudice arising from ineffective assistance of counsel and a guilty plea context, Petitioner must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Thus, even assuming that Blatt's representation was somehow deficient, which it was not, Petitioner has failed to establish that he was prejudiced by these errors. *Id.* at 60. Accordingly, habeas relief is not warranted. *Williams v. Calderon*, 52 F.3d 1465, 1470 (9th Cir. 1995) (The court may eschew an inquiry into the performance component of an ineffectiveness claim under *Strickland* if a habeas petitioner has not shown prejudice.).

B. Trial Counsel Did Not Err By Failing To Seek A Plea Bargain Or By Failing To Offer Mitigating Evidence.

In his second ground for relief, Petitioner contends that Blatt was ineffective at the sentencing phase because he failed to put forth mitigating evidence at the sentencing hearing and by failing to obtain a plea bargain.[10] (Petition p. 6). In addition to

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10 In his traverse, Petitioner also contends that Blatt failed to file a notice of appeal or inform Petitioner of his appellate rights. (Traverse pp. 42-43). While this claim would be troubling if true, Petitioner failed

these broad claims, Petitioner offers four sub-claims: (1) the Blatt advised Petitioner to plead guilty without fully investigating the circumstances of the accident; (2) he failed to investigate or challenge the alleged speed at which Petitioner was driving; (3) he failed to present "other potentially mitigating evidence;" and (4) he failed to objects to "highly prejudicial" testimony at the sentencing hearing. (Traverse p. 35). These claims all lack merit.

To support his contention that Blatt failed to put on mitigating evidence, Petitioner points to Blatt's failure to call any witnesses at the sentencing hearing. (Petition pp. 6 & attachment). However, Petitioner fails to specifically identify what witnesses Blatt should have called to testify, nor has he offered declarations for many prospective witnesses.

As stated previously, Blatt submitted an extensive sentencing memorandum and gave a lengthy statement in mitigation at the hearing. In arguing that the mitigating factors outweighed the aggravating factors in his sentencing memorandum, Blatt contended that: (1) the accident was not the result of the consumption of alcohol or marijuana; (2) Petitioner had not been engaged in a race prior to the crash; (3) he pleaded guilty and accepted responsibility early in the proceedings; (4) he is not "perverse" or "anti-social;" (5) he was deeply remorseful about the crash; (6) he wanted to serve as an example to deter reckless driving; (7) he wished to spare the victim's [sic] families further pain and suffering by extending the proceedings; (8) he

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to raise it in his petition. Because it was raised only in his traverse, it is rejected. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *King v. Rowland*, 977 F.2d 1354, 1357 (9th Cir. 1992).

was eligible and suitable for probation rather than incarceration; (9) a sentence greater than two years would be excessive given Petitioner's lack of criminal record; (10) Petitioner was a young man; (11) he had attended high school and was actively engaged in extracurricular activities; (12) he was gainfully employed at the time of the crash; (13) he served as a volunteer hockey instructor; (14) he planned to join the United States Navy; (15) he was an active member of his church; (16) he had a solid family background in the support of friends; (17) he had been unarmed during the crash; (18) he had carried automobile insurance as required by law; (19) he was willing to comply with the terms of probation if so ordered; (20) he could have, but chose not to, secure bail while awaiting sentencing; (21) sending Petitioner to prison would devastate his family; (22) Petitioner would not pose a danger to others if spared imprisonment. (Answer, Ex. D). During his statement to the sentencing court, Blatt reiterated Petitioner's remorse for the crash, his early acceptance of responsibility in his desire to avoid causing further pain and suffering to the victims [sic] family. (Id., Ex. E). Blatt also reiterated that Petitioner was a young man, and that imprisoning him would ruin his future. (Id.)

Given Blatt's sentencing memorandum in his statements to the court, Petitioner's broad contention that Blatt failed offer any mitigating evidence is meritless. Petitioner's ultimate contention is that Blatt should have done more at sentencing, but Petitioner has failed to identify what more should have been done. In addition, Petitioner has failed to establish that Blatt's sentencing memorandum or statement to the court was insufficient. There is no basis for concluding that counsel's performance at sentencing

was constitutionally deficient.

Petitioner's contention regarding Blatt's failure to seek a plea bargain is similarly meritless. Petitioner has failed to establish that (1) any plea bargain was available or (2) that any plea bargain would have offered Petitioner a more favorable sentence than he received. Indeed, at the sentencing hearing, the District Attorney indicated that he would've filed more serious charges against Petitioner had the case gone forward to the preliminary hearing. (Answer, Ex. E, p. 180). Without any proof that a plea bargain was available or obtainable, Petitioner has failed to demonstrate that Blatt's representation was objectively unreasonable or that he was prejudice by Blatt's representation. Accordingly, habeas relief is not warranted.

Petitioner's first two sub-claims relate to Blatt's alleged failure to investigate the accident. As discussed previously, Petitioner has not offered any proof to substantiate his allegations, including statements by individuals who are willing and able to testify to exculpatory information. Without such evidentiary support, it is impossible for Petitioner to demonstrate that Blatt's representation was ineffective.

In his third sub-claim, Petitioner contends that Blatt erred by failing to investigate "other potentially mitigating evidence." To support this sub-claim, Petitioner has offered the declarations of two individuals who observed Petitioner at the scene of the accident. (Traverse p. 38). In their declarations, the individuals state that they observed Petitioner after the accident and that he appeared remorseful. (Declarations of Don O'Neill & [sic] Alice Constantine, attached to COE). This evidence is merely cumulative of what was presented by Blatt in his sentencing

memorandum and of what was reflected in Blatt's and Petitioner's statements to the sentencing court. The substance abuse to declarations fail to demonstrate a reasonably [sic] probability that the results of the sentencing would have been different had these individuals had been called to testify.

In his fourth and final sub-claim, Petitioner contends that Blatt's performance was constitutionally ineffective because of his failure to object to the "highly prejudicial" testimony of Deputy Corner Dana Bee at the sentencing hearing. At the sentencing hearing, Bee testified that he responded to the scene of the crash and that the scene of the crash has "stayed with" and because of the violence of the crash in the age of the victims. (Answer, Ex. E pp. 150-51).

Petitioner contends that this testimony was highly inflammatory and that counsel was ineffective for failing to object to it. However, a sentencing judge has broad discretion to hear a variety of evidence normally inadmissible at trial. *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1401 (9th Cir. 1989). Petitioner has failed to demonstrate that Bee's testimony was inadmissible, materially false or unreliable. The testimony was merely the opinion of an individual who observed the crash scene and it was similar to many of the letters submitted to the sentencing court. The testimony was admissible, there was no basis for an objection by counsel and Petitioner has failed to demonstrate prejudice. Accordingly, habeas relief is not warranted.

C. <u>There Is No Constitutional Error Arising From Trial Counsel's Alleged Failure To Advise Petitioner Of Potential Immigration Consequences Of His Plea</u>.

In ground three, Petitioner challenges the voluntariness of

his guilty plea, contending that Blatt "grossly misadvis[ed]" him of the immigration consequences of that plea. (Petition p. 6). This claim similarly lacks merit.

The Supreme Court has held that, to be valid, a guilty plea must be voluntary and intelligently made. *Brady v. United States*, 397 U.S. 742, 748-49 (1970). The plea must be made "with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748. For a plea to be voluntary and intelligent, a defendant must be apprized of the direct consequences of entering the plea. *Id.* at 755; *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it." *Brady*, 397 U.S. at 749. In making this determination, it must be remembered that "[s]olemn declarations in open court [such as those made at the time of a plea] carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

To support his argument, Petitioner points to Blatt's April 12, 2000 statement to the media, in which he was quoted as stating that he did not believe that Petitioner's deportation would be automatic. (Traverse p. 44; COE p. 51). However, as noted above, Petitioner was extensively questioned about the consequences of his plea by the court and he consistently answered that he understood his rights and was knowingly and voluntarily pleading guilty. (Answer, Ex. A). His current allegation that he was not aware of the immigration consequences

of his plea is incredible in light of the record in his case. *Blackledge*, 431 U.S. at *id*; See also Farrow, 580 F.2d at 1361 (Defendant's acknowledgment of knowing and voluntary nature of his plea contradicted his claim of being misled by counsel).

The trial judge warned Petitioner that he would be almost certainly be [sic] deported if he pled guilty. Specifically, the trial judge stated:

> If you are not a citizen of the United States, your pleas of guilty can, and **I believe most definitely will result in your being deported from the country**, excluded from re-admission, denied naturalization or amnesty pursuant to the immigration laws of the United States.
>
> I say most probably will, because although the area of law is somewhat in flux it is - **I am advising you to expect deportation in this case**, because the court of the immigration courts and the federal courts have viewed the potential punishment as the basis for deportation decision, not the time that you actually get in custody, because even as a condition of probation and you have an exposure of 365 days in county jail under a probation grant.
>
> **I believe that will - that will**

> **constitute the basis for deportation**, and I want you to enter this plea with the understanding that it will happen.
> If you feel for any reason that this is a factor in your decision to enter the plea or not enter the plea, then I'll tell you don't enter the plea, **but I'm telling you [that] you can expect to be deported as result of this plea.**
> Do you understand that?

(Answer, Ex. A pp. 32-33) (emphasis added). Petitioner responded, "Yes." (Id. p. 33). The judge again asked Petitioner he wished to go forward with his plea, knowing the immigration consequences and Petitioner again responded, "Yes." (Id).

Even assuming that Blatt was misinformed about the possibility of deportation and even misadvised Petitioner in this respect, Petitioner was not prejudiced. The judge clearly informed Petitioner that he would be deported if he pleaded guilty. The judge did not simply read boilerplate language to Petitioner; rather, he specifically warned Petitioner four times to expect deportation if he pleaded guilty. Any error in Blatt's advice was negated by the court's correct advice. *United States v. Thornton*, 23 F.3d 1532, 1533-34 (9th Cir. 1994) (per curium) (holding that allegedly incorrect advice by counsel can be overcome by correct advice by the court); *Doganiere v. United States*, 914 F.2d 165, 168 (9th Cir. 1990). Under the totality of the circumstances, Petitioner has failed to demonstrate that his plea was involuntary or unknowing. Accordingly, habeas relief is not warranted.

IV. Conclusion.

For the reasons stated above, I find that Petitioner's claims of ineffective assistance of counsel are meritless. Each claim is predicated upon speculation, conjecture and misstatements of the governing law and the facts of this case. I therefore respectfully recommend that the petition for writ of habeas corpus be DENIED.

Dated: December 12, 2002

s/ Marc L. Goldman
Marc L. Goldman
United States Magistrate Judge

ANTHONY D. ZINNANTI, ESQ.; SBN: 196778
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Attorney for Petitioner,
MARCUS LELLAN

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARCUS LELLAN, Petitioner, v. TOMMY E. VAUGHN, in his capacity as Warden of Chuckawalla Valley State Prison, Respondent. _____/	Case Number: CV 02-01375-HLH (mlg) PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

COMES NOW, Petitioner, MARCUS LELLAN ("Petitioner"), and sets forth the herein stated objections to the Report and Recommendation of the United States Magistrate Judge on Petitioner's Petition for Writ of Habeas Corpus.

These objections are made pursuant to this notice of objections, the objections herein and the supporting memorandum of points and authorities.

Dated: December 27, 2002

s/ Anthony D. Zinnanti
ANTHONY D. ZINNANTI
Attorney for Petitioner,
MARCUS LELLAN

OBJECTIONS TO REPORT AND RECOMMENDATION

A.

Objections to Factual Determinations

The following objections come pursuant to 28 U.S.C., §636(b)(1)(C) and *Thomas v. Arn*, 474 U.S. 140, 150 (1985) [regarding, *inter alia*, lack of distinction between legal and factual objections pursuant to Section 636(b)(1)(C)]. Accordingly, the following objections regard the Magistrate Judge's factual determinations.

Objection Number 1: Petitioner objects to that portion of the Report and Recommendation of the United States Magistrate Judge ("Report and Recommendation") at page 2, footnote 2, wherein it is set forth that "Petitioner contends that he was traveling at no more than 85 miles per hour."

As set forth, *ad nauseam*, in Petitioner's traverse, Petitioner's speed was heavily in issue and specifically set forth as anywhere from 70 to 85 miles per hour. (Traverse 12:13 - 13:20.) Any and all statements regarding Petitioner's speed were unchecked due to defense counsel's lack of investigation and yield anything but a dispositive finding of fact.

Objection Number 2: Petitioner objects to that portion of the Report and Recommendation at page 2, footnote 2, wherein it

is set forth that "the State's accident reconstruction expert put Petitioner's speed between 90-106 MPH."

This is an erroneous restatement of the record. The state never alleged that Petitioner was going "106 MPH" prior to losing control of the vehicle. Specifically, at Petitioner's Traverse, page 13:3 - 8, as corroborated by the report of the investigating sheriff deputy[1] (Compendium of Exhibits ("COE"), page 34 and 36 at ¶13), the traffic deputy determined that Petitioner was going 90 miles per hour at the time of entering the skid and accelerated to 106 miles per hour over the distance of 125 feet. Petitioner contends that this is an impossible measurement to ascertain given the data collected by the investigating deputy.

Further, the speed determination by the investigating traffic deputy was premised upon a visual examination of the roadway surface and an estimate of the coefficient of friction as .75 with an addition of .04 due to the uphill slope of the area in which Petitioner lost control of the vehicle. (COE, page 34.) The estimation therefore served as a basis for the calculation of speed which was an acceleration of 16 miles per hour over the course of

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1 There was no "[State] accident reconstruction expert." (Report and Recommendation at page 2, footnote 2.) All of the accident investigation on behalf of the State was performed by a deputy assigned to traffic detail and investigation. More than semantics, the term "accident reconstruction expert" clearly implies more than visiting the scene, taking measurements and making the respective calculations (or estimations). There was never any evidence of "reconstruction" made available to the defense.

the span of 125 feet with an increasing coefficient of friction. As set forth in the Declaration of Timothy Reust, this calculation was impossible to determine on the basis of the evidence and further that "the slope of the roadway's surface was not properly incorporated into the calculation of the vehicle's speed." (COE 36:7 - 9.)

Petitioner's speed as between 70 to 80 miles per hour (stated at the scene of the crash, Traverse 13:2 and COE 18) to "106 MPH" is a tremendous variation in the speed and, hence, Petitioner's culpability. Either way, relevant to Petitioner's basis for relief (ineffective assistance of counsel), the matter went wholly without investigation. The lack of investigation is undisputed.

Objection Number 3: Petitioner objects to the portion of the Report and Recommendation that determines "[e]ven assuming that Reust [Petitioner's expert] would have determined that Petitioner was traveling at a speed lower than 90 MPH, it is a difference without distinction."

For the reasons set forth in Objection Number 3, *supra*, this determination summarily disposes of the most salient aspect of Petitioner's degree of culpability and disposes of it on a basis which is an erroneous restatement of the record. Establishing that Petitioner's speed was 70 miles an hour or 106 miles per hour would clearly create a discernable and vast difference in Petitioner's culpability for the crash. The relevant jury instructions were set forth and discussed at length, thereby substantiating why the speed determination and consideration of the circumstances surrounding the collision were tantamount. (See Traverse at page 27:5 through 31:11.)

Objection Number 4: Petitioner objects to the portion of the Report and Recommendation that regards "possible third party culpability."

This is an erroneous restatement of the record and argument. First, Petitioner never refers to any party - other than himself - as culpable or having culpability. Petitioner admits culpability; the degree, however, is what remains in issue and what was completely uninvestigated. The point of Petitioner's argument is the presence of factors - specifically the "two cars traveling approximately 35 - 40 MPH," the reason for which Petitioner lost control of his vehicle, the reasonableness of entering the bicycle lane to avert collision[2], and Petitioner's actual speed as should have been investigated and would have been established at trial or for the purpose of effective plea bargaining.

The Magistrate Judge, however, dedicates considerable attention to the issue of the interaction with the "CNS" gangmembers (Report and Recommendation, page 12) further averring counsel's "misstatement of the facts." What the Magistrate Judge regards as a "misstatement of the facts" was Petitioner (through his counsel) reiterating the only consistencies in the varied statements of witness Weber and the other parties. Specifically, Petitioner's Traverse sets forth that (1) there was another vehicle, (2) the vehicle contained several gang members "according to Weber," (3) the vehicle came to engage Petitioner's vehicle (whether Petitioner was "messing with" the gangsters or the gangsters were messing with Marcus), and (4) that Petitioner

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2 See Objections to Legal Determinations, *infra*.

sped off as a result of the presence of the other vehicle - regardless of who was messing with whom. Petitioner, through his counsel, made the entire record available to this Court and if Petitioner was interested in making a misstatement of the facts, clearly would not have made all of the materials unconditionally available. Conversely, the Magistrate Judge received the unsworn interview of witness Weber as a dispositive statement of fact.[3]

The actions of the vehicles were noted both in statement of Reyna Marcus (Traverse, page 9:11 - 16 and at COE 22) and the Declaration of Alice Constantine, who witnessed the accident, an altercation after the accident and two cars speeding through the accident scene after the collision. (See Declaration of Alice Constantine filed contemporaneously with Petitioner's Traverse.) These observations were summarily rejected by the Magistrate Judge. More importantly, defense counsel for Petitioner failed to investigate the observations of these witnesses. Further, and most relevant to the basis for Petitioner's claim, there is no evidence that Petitioner's defense counsel interviewed Weber.

The Magistrate Judge criticizes Petitioner's presentation of a report regarding an altercation between Timothy Renolds and possible "CNS" gangmembers as being "unsworn" and the author of which not witnessing the events. (See Report and

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3 Daniel Weber was under tremendous community pressure to disassociate himself with Petitioner. This disassociation is evident from Weber's statements. The veracity of Weber's statements is therefore heavily in issue and should be understood to be such by the Court. Also, due to Weber's statements, there is also considerable information with which the decedent's families live with that is false.

Recommendati, page 12:5 - 9 as it regards COE page 166.) However, the statement which the Magistrate Judge regards as a dispositive statement of fact - i.e., Weber's statement to the Sheriff Department and prosecutor - is equally unsworn and openly avers lack of personal knowledge of the statements Weber made regarding Petitioner's modification of his vehicle. Specifically, see last two paragraphs of COE page 15. In any event, the relevant point is that Weber's statements and the matter went wholly without investigation.

There is no question that Petitioner was speeding. There is no question that Petitioner had a habit of speeding. (Petitioner's history is correctly noted by the Magistrate Judge at footnote 6 at page 10 of the Report and Recommendation.) There is no question that whether or not gangmembers were present and a menace, it would not have justified any culpability on Petitioner's part in and of itself. However, the one relevant issue is whether a jury would have found Petitioner guilty beyond a reasonable doubt for vehicular manslaughter in consideration of all of the facts and factors pertaining to the incident. As alleged in Petitioner's Petition and Traverse, and as corroborated by the Compendium of Exhibits, the factors pertaining to the "two cars traveling approximately 35 - 40 MPH," the reason for which Petitioner lost control of his vehicle, the reasonableness of entering the bicycle lane to avert collision, and Petitioner's actual speed would have made a difference. Because - and only because - Petitioner's defense attorney failed to investigate, Petitioner's case was never developed and received nothing but the worst possible outcome, including deportation. Conversely, the Magistrate Judge has deemed these issues to be irrelevant and Petitioner objects thereto.

Objection Number 5: Petitioner objects to the portion of the Report and Recommendation that sets forth that "Petitioner has not offered any indication that he would have insisted on going to trial had any of this alleged information been available when he pleaded guilty." (Report and Recommendation, 14:22 - 24.)

This reflects a misreading of Petitioner's Traverse. At page 24 and 25, in response to Respondent's argument regarding the quality of Petitioner's pleading, Petitioner expressly set forth:

> "Petitioner implicitly avers through the facts set forth in the Petition that there is at least a reasonable probability that Petitioner would have attained a better outcome at trial and would not have pleaded guilty in an open plea to the counts of vehicular manslaughter. More specifically, had counsel performed an investigation, Petitioner would have, at minimum, been in a position to competently negotiate a plea bargain or defend the matter at trial and possibly avoid the dire immigration consequences to which he is now subject. * * * Because Petitioner was subject to the potentially worst possible outcome, there is no question that Petitioner suffered prejudicially as a result of counsel's deficient performance."

In further citing *Hill v. Lockhart*, 474 U.S. 52, 56- 60 (1985), Petitioner expressly set forth:

> "Here, the prejudicial detriment to Marcus was in counsel's advice to take an open plea, and counsel's complete failure to investigate matters pertinent to sentencing. Had the defense been

better informed about the potential defenses to the matter and had the defense interviewed Alice Constantine and Don O'Neil, there is no question the outcome would have been better for Marcus. Marcus, who had no prior criminal record, received as harsh a sentence as possible for a first time offender; and, this is before consideration of the very drastic impact of the sentence's immigration consequences for Marcus." (Traverse, page 38:4 - 10.)

Objection Number 6: Petitioner objects to the portion of the Report and Recommendation that sets forth "nor has [Petitioner] offered declarations from any prospective witnesses" with regard to sentencing.

Petitioner remitted the declarations of Don O'Neill and Alice Constantine. The Declaration of Alice Constantine expressly addresses her observations, including Petitioner's condition at the time of the incident. Alice Constantine was a potential, unbiased third party witness who could have and would have testified to Petitioner's condition of shock at the time of the crash. This was clearly probative to the comments regarding Petitioner's "lack of remorse" with regard to sentencing. The Magistrate Judge, however, has summarily discounted the value of unbiased third party testimony as "merely cumulative" of what was presented by counsel in counsel's soliloquy to the sentencing court. (Report and Recommendation, page 18:18 - 19.) Accordingly, the balance before the sentencing court was the State's presentation of (1) gruesome photographs of the accident scene, which the sentencing judge previewed just prior to

sentencing, (2) the testimony of the coroner describing this scene as one that "stayed with" the coroner due to the number and ages of the victims, and (3) unchecked testimony that Petitioner was traveling between 90 and 106 miles per hour, versus defense counsel's speech and sentencing memorandum outlining some very generic features pertaining to his client.

Notably, the declarations of O'Neill and Constantine went to show (1) the existence of factors regarding the degree of Petitioner's culpability and (2) most importantly, that defense counsel for Petitioner failed to investigate. Petitioner, through his counsel, objects to the summarily rejection of the value of the declarant's statements and their possible probative effect on guilt and sentencing.

Objection Number 7: Petitioner objects to the portion of the Report and Recommendation that determines that "Petitioner has failed to establish that (1) any plea bargain was available or (2) that any plea bargain would have offered Petitioner a more favorable sentence than he received." (Report and Recommendation, page 17:21 - 24.) This appears to be the basis for the Magistrate Judge's determination that there was no ineffective assistance of counsel as a result of Petitioner's counsel's failure to seek a plea agreement.

The conclusion begs the question. Petitioner would clearly not have known if a plea agreement was available if his attorney failed to seek one. Further, Petitioner would not have known if any plea agreement was would have been more favorable if his attorney did not seek one. Accordingly, Petitioner objects to the Magistrate Judge's dismissal of the claim on this reasoning.

B.

Objections to Legal Determinations

Objection Number 8: This objection is legal in part and factual in part. Petitioner objects to the portion of the Report and Recommendation that sets forth that the "declaration of [Petitioner's expert Timothy Reust] is essentially frivolous because it is undisputed that Petitioner passed another vehicle on the right in a bicycle lane. The actual width of that bicycle lane does not increase nor decrease the recklessness of that conduct. Any additional 'investigation' would have been meaningless." (Report and Recommendation, page 9:10 - 15.)

The Magistrate Judge's determination of entry into the bicycle lane as *per se* reckless is legally erroneous under California law. It is not illegal to drive a motor vehicle in a bicycle lane. Specifically, California Vehicle Code, §21209, sets forth, in full:

> "(a) No person shall drive a motor vehicle in a bicycle lane established on a roadway pursuant to Section 21207 except as follows:
>
> "(1) To park where parking is permitted.
>
> "(2) To enter or leave the roadway.
>
> "(3) To prepare for a turn within a distance of 200 feet from the intersection.
>
> "(b) This section does not prohibit the use of a motorized bicycle in a bicycle lane, pursuant to Section 21207.5, at a speed no greater than is reasonable or prudent, having due regard for visibility, traffic conditions, and the condition of the roadway surface of the bicycle lane, and in a

manner which does not endanger the safety of bicyclists." (*Emphasis added.*)

Clearly, as Petitioner was going to "enter or leave the roadway" (California Vehicle Code, §21209(a)(2)) to avoid colliding with the two slower moving vehicles (Report and Recommendation, page 2:10 - 11) the act was legal. There is further no issue that a bicyclist was endangered by Petitioner's act of entering the bicycle lane.

Because it is not *per se* reckless or illegal to enter the bicycle lane, the width of the bicycle lane[4] is clearly relevant to the applicable jury instructions that would have been given at the time of trial. This was further addressed at length in Petitioner's Traverse. Specifically, in examination of the applicable jury instructions, vehicular mansllaughter would have to have been established in accord with the following:

> "A killing is unlawful when a person [commits an unlawful act [not amounting to a felony] which is dangerous to human life under the circumstances of its commission,] [or] [negligently commits an act ordinarily lawful which might produce death], which [unlawful] [or] [negligent] act is a cause of the death of another human being.
>
> "In order to prove this crime, each of the following elements must be proved:

---

4 As would be presented at trial, this bicycle lane is actually wide enough to create an additional lane of traffic at the point of the road where the accident took place.

"1. The driver of a vehicle [committed [with gross negligence] an unlawful act [not amounting to a felony], [which under the circumstances of its commission was dangerous to human life,] namely, a violation of_____] [or] [committed [with gross negligence] [negligently] an act ordinarily lawful which might cause death]; and

"2. The unlawful or negligent act was a cause of the death of another human being." (California Jury Instructions - Criminal, Instruction 8.90, as restated and discussed at length in Petitioner's Traverse at page 27:20 - 28:20.)

Because causation is in issue, each and every aforementioned factor pertaining to why the collision occurred was properly the subject of investigation. There could have been no detriment to Petitioner's defense by having had more information.

Objection Number 9: Petitioner objects to the portion of the Report and Recommendation that sets forth that "[t]he testimony [of the deputy coroner] was admissible, there was no basis for an objection by counsel and Petitioner has failed to demonstrate prejudice."

This is a legally erroneous conclusion of law. As a fundamental aspect of California evidence law, there exists California Evidence Code, §352. California Evidence Code, §352, sets forth in full:

"The court in its discretion may exclude evidence

> if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

California Evidence Code, §352, is clearly a basis for objection to testimony - such as the coroner's - where the occurrence of a death and the manner in which the death occurred are not in issue.

Objection Number 10: Petitioner objects to the portion of the Report and Recommendation finding that the trial court's admonition regarding the immigration consequences of Petitioner's plea cure counsel's erroneous advice to Petitioner regarding the same. Specifically, the Magistrate Judge concludes that "[a]ny error in [counsel's] advice was negated by the court's correct advice." (Report and Recommendation, page 22:5 - 6.)

In the course of the trial court's admonition, it was stated that Petitioner could "expect to be deported," however, it was also stated that "the area of law is somewhat in flux." In support of the Magistrate Judge's determination, the cases of *United States v. Thornton*, 23 F.3d 1532 (9th Cir. 1994) and *Doganiere v. United States*, 914 F.2d 165 (9th Cir. 1990) are cited. Both are cases which pre-date the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), both of which put "the area of law is somewhat in flux." As cited in Petitioner's Traverse, Petitioner had a right to rely on the advice of counsel. Petitioner's authorities are post-AEDPA and post-IIRIRA and explicitly deal with the issue of faulty advice of counsel in light of the sweeping changes

to immigration law thereafter the said Acts. Accordingly, Petitioner's authorities should be controlling on the issue.

Respectfully submitted,

LAW OFFICES OF ANTHONY D. ZINNANTI

Dated:December 27, 2002 s/Anthony D. Zinnanti
ANTHONY D. ZINNANTI
Attorney for Petitioner,
MARCUS LELLAN

State of California)
) ss.
County of Los Angeles)

I, the undersigned, hereby certify that I am a citizen of the United States and over the age of 18; I work in the County of Los Angeles, California, which County the within service took place either by mail, facsimile or personally; and, I am not a party to the subject case. This firm's business address is 23822 W. Valencia Boulevard, Suite 304D, Valencia, California 91355.

I am readily familiar with the rules and laws pertaining to the service of legal documents and pleadings via the United States Mails and other means of transmission.

On December 27, 2002, I made service of the documents, described as PETITIONER'S OBJECTIONS TO REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, by sending a true and correct copy of said document via facsimile at the time of _____, and thereafter via United States Mail, postage pre-paid and addressed to:

Brad D. Levenson, Esq. / DAG
OFFICE FOR THE ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA
300 South Spring Street, Suite 500
Los Angeles, California 90013

I declare under the penalty of perjury and the laws of the State of California that the foregoing is true and correct.

Dated: December 27, 2002 s/Anthony D. Zinnanti
Santa Clarita, California Anthony D. Zinnanti

[File Stamp]
Filed
JAN 10 2002
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY s/ "JS" DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARCUS LELLAN, Petitioner, v. TOMMY E. VAUGHN, Warden, Respondent. /	Case No.: CV02-01375 HLH(mlg) ORDER ACCEPTING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. s. 636(b)(1)(C), the court has reviewed the petition and all of the records and files herein. The Court accepts and adopts the findings and recommendations of the United States Magistrate Judge in the Report and Recommendation attached hereto and orders that judgment be entered denying the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Report and Recommendation, and the Judgment herein on all parties

Dated: Jan 8, 2003

s/ Harry L. Hupp
Harry L. Hupp
United States District Judge

[File Stamp]
ENTERED
JAN 10 2002
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY s/ "MG" DEPUTY

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FILED
JAN 10 2002
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY s/ "JS" DEPUTY

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARCUS LELLAN,
Petitioner,
v.
TOMMY E. VAUGHN,
Warden,
Respondent.
_____/

Case No.: CV02-01375 HLH(mlg)

JUDGMENT

IT IS ADJUDGED that the petition herein is denied with prejudice.

Dated: Jan. 8, 2003

s/ Harry L. Hupp
Harry L. Hupp
United States District Court

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FILED
CLERK, U.S. DISTRICT COURT
FEB 10 2003
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Attorney for Petitioner,
MARCUS LELLAN

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARCUS LELLAN, Petitioner, v. TOMMY E. VAUGHN, in his capacity as Warden of Chuckawalla Valley State Prison, Respondent. _____/	Case Number: CV 02-01375-HLH (mlg) PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY (28 U.S.C., §2253) [Filed concurrently with Notice of Appeal]

COMES NOW, Petitioner, MARCUS LELLAN ("Petitioner"), and seeks to move this Court for a certificate of appealability for the purpose of taking appeal from the Order Adopting the Findings, Conclusions, and Recommendations of United States Magistrate Judge and Judgment thereon. This application for a certificate of appealability comes timely pursuant to the requisites of 28 U.S.C., §2253 and is filed concurrently with

the Notice of Appeal in this matter.

LAW OFFICES OF ANTHONY D. ZINNANTI

Dated: January 7, 2003

s/ Anthony D. Zinnanti
ANTHONY D. ZINNANTI
Attorney for Petitioner,
MARCUS LELLAN

MEMORANDUM OF POINTS AND AUTHORITIES

I.

Statement of Pertinent Facts

On January 10, 2003, The United States District Court for the Central District of California adopted the Magistrate Judge's Report and Recommendations and denied, with prejudice, Petitioner's Petition for Writ of Habeas Corpus.

Prior to the final and appealable judgment in this matter, Petitioner filed and served objections to the said Magistrate Judge's Report and Recommendations. Petitioner's objections are set forth below. Each of the objections relates to the three grounds for which Petitioner petitioned for a writ of habeas corpus: (1) prejudicial ineffective assistance of counsel for counsel's failure to investigate available and pertinent information regarding Petitioner's actual speed and the possible involvement of third parties; (2) prejudicial ineffective assistance of counsel at the sentencing stage of proceedings by failing to seek to obtain a plea bargain, challenge the issue of speed as an aggravating factor and failing to object to the highly prejudicial evidence of the coroner; and, (3) prejudicial ineffective assistance of counsel for failure to properly advise as to the immigration consequences of Petitioner's plea and sentence.

In regard to the first two grounds for relief on petition for writ of habeas corpus, aforementioned, Petitioner set forth the following objections (quoted verbatim):

Objection Number 1: Petitioner objects to that portion of the Report and Recommendation of the United States Magistrate Judge ("Report and Recommendation") at page 2, footnote 2, wherein it is set forth that "Petitioner contends that he was

traveling at no more than 85 miles per hour."

As set forth, *ad nauseam*, in Petitioner's traverse, Petitioner's speed was heavily in issue and specifically set forth as anywhere from 70 to 85 miles per hour. (Traverse 12:13 - 13:20.) Any and all statements regarding Petitioner's speed were unchecked due to defense counsel's lack of investigation and yield anything but a dispositive finding of fact.

Objection Number 2: Petitioner objects to that portion of the Report and Recommendation at page 2, footnote 2, wherein it is set forth that "the State's accident reconstruction expert put Petitioner's speed between 90-106 MPH."

This is an erroneous restatement of the record. The state never alleged that Petitioner was going "106 MPH" prior to losing control of the vehicle. Specifically, at Petitioner's Traverse, page 13:3 - 8, as corroborated by the report of the investigating sheriff deputy[1] (Compendium of Exhibits ("COE"), page 34 and 36 at ¶13), the traffic deputy determined that Petitioner was going 90 miles per hour at the time of entering the skid and accelerated to 106 miles per hour over the distance of 125 feet. Petitioner

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1 There was no "[State] accident reconstruction expert." (Report and Recommendation at page 2, footnote 2.) All of the accident investigation on behalf of the State was performed by a deputy assigned to traffic detail and investigation. More than semantics, the term "accident reconstruction expert" clearly implies more than visiting the scene, taking measurements and making the respective calculations (or estimations). There was never any evidence of "reconstruction" made available to the defense.

contends that this is an impossible measurement to ascertain given the data collected by the investigating deputy.

Further, the speed determination by the investigating traffic deputy was premised upon a visual examination of the roadway surface and an estimate of the coefficient of friction as .75 with an addition of .04 due to the uphill slope of the area in which Petitioner lost control of the vehicle. (COE, page 34.) The estimation therefore served as a basis for the calculation of speed which was an acceleration of 16 miles per hour over the course of the span of 125 feet with an increasing coefficient of friction. As set forth in the Declaration of Timothy Reust, this calculation was impossible to determine on the basis of the evidence and further that "the slope of the roadway's surface was not properly incorporated into the calculation of the vehicle's speed." (COE 36:7 - 9.)

Petitioner's speed as between 70 to 80 miles per hour (stated at the scene of the crash, Traverse 13:2 and COE 18) to "106 MPH" is a tremendous variation in the speed and, hence, Petitioner's culpability. Either way, relevant to Petitioner's basis for relief (ineffective assistance of counsel), the matter went wholly without investigation. The lack of investigation is undisputed.

Objection Number 3: Petitioner objects to the portion of the Report and Recommendation that determines "[e]ven assuming that Reust [Petitioner's expert] would have determined that Petitioner was traveling at a speed lower than 90 MPH, it is a difference without distinction."

For the reasons set forth in Objection Number 3, *supra*, this determination summarily disposes of the most salient aspect of

Petitioner's degree of culpability and disposes of it on a basis which is an erroneous restatement of the record. Establishing that Petitioner's speed was 70 miles an hour or 106 miles per hour would clearly create a discernable and vast difference in Petitioner's culpability for the crash. The relevant jury instructions were set forth and discussed at length, thereby substantiating why the speed determination and consideration of the circumstances surrounding the collision were tantamount. (See Traverse at page 27:5 through 31:11.)

Objection Number 4: Petitioner objects to the portion of the Report and Recommendation that regards "possible third party culpability."

This is an erroneous restatement of the record and argument. First, Petitioner never refers to any party - other than himself - as culpable or having culpability. Petitioner admits culpability; the degree, however, is what remains in issue and what was completely uninvestigated. The point of Petitioner's argument is the presence of factors - specifically the "two cars traveling approximately 35 - 40 MPH," the reason for which Petitioner lost control of his vehicle, the reasonableness of entering the bicycle lane to avert collision[2], and Petitioner's actual speed as should have been investigated and would have been established at trial or for the purpose of effective plea bargaining.

The Magistrate Judge, however, dedicates considerable attention to the issue of the interaction with the "CNS" gangmembers (Report and Recommendation, page 12) further

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2 See Objections to Legal Determinations, *infra*.

averring counsel's "misstatement of the facts." What the Magistrate Judge regards as a "misstatement of the facts" was Petitioner (through his counsel) reiterating the only consistencies in the varied statements of witness Weber and the other parties. Specifically, Petitioner's Traverse sets forth that (1) there was another vehicle, (2) the vehicle contained several gang members "according to Weber," (3) the vehicle came to engage Petitioner's vehicle (whether Petitioner was "messing with" the gangsters or the gangsters were messing with Marcus), and (4) that Petitioner sped off as a result of the presence of the other vehicle - regardless of who was messing with whom. Petitioner, through his counsel, made the entire record available to this Court and if Petitioner was interested in making a misstatement of the facts, clearly would not have made all of the materials unconditionally available. Conversely, the Magistrate Judge received the unsworn interview of witness Weber as a dispositive statement of fact.[3]

The actions of the vehicles were noted both in statement of Reyna Marcus (Traverse, page 9:11 - 16 and at COE 22) and the Declaration of Alice Constantine, who witnessed the accident, an altercation after the accident and two cars speeding through the accident scene after the collision. (See Declaration of Alice Constantine filed contemporaneously with Petitioner's Traverse.)

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3 Daniel Weber was under tremendous community pressure to disassociate himself with Petitioner. This disassociation is evident from Weber's statements. The veracity of Weber's statements is therefore heavily in issue and should be understood to be such by the Court. Also, due to Weber's statements, there is also considerable information with which the decedent's families live with that is false.

These observations were summarily rejected by the Magistrate Judge. More importantly, defense counsel for Petitioner failed to investigate the observations of these witnesses. Further, and most relevant to the basis for Petitioner's claim, there is no evidence that Petitioner's defense counsel interviewed Weber.

The Magistrate Judge criticizes Petitioner's presentation of a report regarding an altercation between Timothy Renolds and possible "CNS" gangmembers as being "unsworn" and the author of which not witnessing the events. (See Report and Recommendation, page 12:5 - 9 as it regards COE page 166.) However, the statement which the Magistrate Judge regards as a dispositive statement of fact - i.e., Weber's statement to the Sheriff Department and prosecutor - is equally unsworn and openly avers lack of personal knowledge of the statements Weber made regarding Petitioner's modification of his vehicle. Specifically, see last two paragraphs of COE page 15. In any event, the relevant point is that Weber's statements and the matter went wholly without investigation.

There is no question that Petitioner was speeding. There is no question that Petitioner had a habit of speeding. (Petitioner's history is correctly noted by the Magistrate Judge at footnote 6 at page 10 of the Report and Recommendation.) There is no question that whether or not gangmembers were present and a menace, it would not have justified any culpability on Petitioner's part in and of itself. However, the one relevant issue is whether a jury would have found Petitioner guilty beyond a reasonable doubt for vehicular manslaughter in consideration of all of the facts and factors pertaining to the incident. As alleged in Petitioner's Petition and Traverse, and as corroborated by the Compendium of

Exhibits, the factors pertaining to the "two cars traveling approximately 35 - 40 MPH," the reason for which Petitioner lost control of his vehicle, the reasonableness of entering the bicycle lane to avert collision, and Petitioner's actual speed would have made a difference. Because - and only because - Petitioner's defense attorney failed to investigate, Petitioner's case was never developed and received nothing but the worst possible outcome, including deportation. Conversely, the Magistrate Judge has deemed these issues to be irrelevant and Petitioner objects thereto.

Objection Number 5: Petitioner objects to the portion of the Report and Recommendation that sets forth that "Petitioner has not offered any indication that he would have insisted on going to trial had any of this alleged information been available when he pleaded guilty." (Report and Recommendation, 14:22 - 24.)

This reflects a misreading of Petitioner's Traverse. At page 24 and 25, in response to Respondent's argument regarding the quality of Petitioner's pleading, Petitioner expressly set forth:

> "Petitioner implicitly avers through the facts set forth in the Petition that there is at least a reasonable probability that Petitioner would have attained a better outcome at trial and would not have pleaded guilty in an open plea to the counts of vehicular manslaughter. More specifically, had counsel performed an investigation, Petitioner would have, at minimum, been in a position to competently negotiate a plea bargain or defend the matter at trial and possibly avoid the dire immigration consequences to which he is now subject. * * * Because Petitioner was subject to

the potentially worst possible outcome, there is no question that Petitioner suffered prejudicially as a result of counsel's deficient performance."

In further citing *Hill v. Lockhart*, 474 U.S. 52, 56- 60 (1985), Petitioner expressly set forth:

"Here, the prejudicial detriment to Marcus was in counsel's advice to take an open plea, and counsel's complete failure to investigate matters pertinent to sentencing. Had the defense been better informed about the potential defenses to the matter and had the defense interviewed Alice Constantine and Don O'Neil, there is no question the outcome would have been better for Marcus. Marcus, who had no prior criminal record, received as harsh a sentence as possible for a first time offender; and, this is before consideration of the very drastic impact of the sentence's immigration consequences for Marcus." (Traverse, page 38:4 - 10.)

Objection Number 6: Petitioner objects to the portion of the Report and Recommendation that sets forth "nor has [Petitioner] offered declarations from any prospective witnesses" with regard to sentencing.

Petitioner remitted the declarations of Don O'Neill and Alice Constantine. The Declaration of Alice Constantine expressly addresses her observations, including Petitioner's condition at the time of the incident. Alice Constantine was a potential, unbiased third party witness who could have and would have testified to Petitioner's condition of shock at the time of the

crash. This was clearly probative to the comments regarding Petitioner's "lack of remorse" with regard to sentencing. The Magistrate Judge, however, has summarily discounted the value of unbiased third party testimony as "merely cumulative" of what was presented by counsel in counsel's soliloquy to the sentencing court. (Report and Recommendation, page 18:18 - 19.) Accordingly, the balance before the sentencing court was the State's presentation of (1) gruesome photographs of the accident scene, which the sentencing judge previewed just prior to sentencing, (2) the testimony of the coroner describing this scene as one that "stayed with" the coroner due to the number and ages of the victims, and (3) unchecked testimony that Petitioner was traveling between 90 and 106 miles per hour, versus defense counsel's speech and sentencing memorandum outlining some very generic features pertaining to his client.

Notably, the declarations of O'Neill and Constantine went to show (1) the existence of factors regarding the degree of Petitioner's culpability and (2) most importantly, that defense counsel for Petitioner failed to investigate. Petitioner, through his counsel, objects to the summarily rejection of the value of the declarant's statements and their possible probative effect on guilt and sentencing.

Objection Number 7: Petitioner objects to the portion of the Report and Recommendation that determines that "Petitioner has failed to establish that (1) any plea bargain was available or (2) that any plea bargain would have offered Petitioner a more favorable sentence than he received." (Report and Recommendation, page 17:21 - 24.) This appears to be the basis for the Magistrate Judge's determination that there was no

ineffective assistance of counsel as a result of Petitioner's counsel's failure to seek a plea agreement.

The conclusion begs the question. Petitioner would clearly not have known if a plea agreement was available if his attorney failed to seek one. Further, Petitioner would not have known if any plea agreement was would have been more favorable if his attorney did not seek one. Accordingly, Petitioner objects to the Magistrate Judge's dismissal of the claim on this reasoning.

Petitioner further set forth the following objection with regard to trial counsel's failure to investigate the facts relating to the speed at which Petitioner was driving prior to the time of the crash. The objection was part legal in nature and part factual in nature, all going to the Magistrate Judge's summary conclusion that Petitioner's driving in the bicycle lane was "per se" grossly negligent thereby precluding the need for investigation on part of trial counsel. Specifically, Petitioner set forth:

Objection Number 8: This objection is legal in part and factual in part. Petitioner objects to the portion of the Report and Recommendation that sets forth that the "declaration of [Petitioner's expert Timothy Reust] is essentially frivolous because it is undisputed that Petitioner passed another vehicle on the right in a bicycle lane. The actual width of that bicycle lane does not increase nor decrease the recklessness of that conduct. Any additional 'investigation' would have been meaningless." (Report and Recommendation, page 9:10 - 15.)

The Magistrate Judge's determination of entry into the bicycle lane as *per se* reckless is legally erroneous under California law. It is not illegal to drive a motor vehicle in a bicycle lane. Specifically, California Vehicle Code, §21209, sets forth, in

full:

> "(a) No person shall drive a motor vehicle in a bicycle lane established on a roadway pursuant to Section 21207 except as follows:
> "(1) To park where parking is permitted.
> "(2) To enter or leave the roadway.
> "(3) To prepare for a turn within a distance of 200 feet from the intersection.
> "(b) This section does not prohibit the use of a motorized bicycle in a bicycle lane, pursuant to Section 21207.5, at a speed no greater than is reasonable or prudent, having due regard for visibility, traffic conditions, and the condition of the roadway surface of the bicycle lane, and in a manner which does not endanger the safety of bicyclists." (*Emphasis added.*)

Clearly, as Petitioner was going to "enter or leave the roadway" (California Vehicle Code, §21209(a)(2)) to avoid colliding with the two slower moving vehicles (Report and Recommendation, page 2:10 - 11) the act was legal. There is further no issue that a bicyclist was endangered by Petitioner's act of entering the bicycle lane.

Because it is not *per se* reckless or illegal to enter the bicycle lane, the width of the bicycle lane[4] is clearly relevant to

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4 As would be presented at trial, this bicycle lane is actually wide enough to create an additional lane of traffic at the point of the road where the accident took place.

the applicable jury instructions that would have been given at the time of trial. This was further addressed at length in Petitioner's Traverse. Specifically, in examination of the applicable jury instructions, vehicular mansllaughter would have to have been established in accord with the following:

> "A killing is unlawful when a person [commits an unlawful act [not amounting to a felony] which is dangerous to human life under the circumstances of its commission,] [or] [negligently commits an act ordinarily lawful which might produce death], which [unlawful] [or] [negligent] act is a cause of the death of another human being.
>
> "In order to prove this crime, each of the following elements must be proved:
>
> "1. The driver of a vehicle [committed [with gross negligence] an unlawful act [not amounting to a felony], [which under the circumstances of its commission was dangerous to human life,] namely, a violation of_____] [or] [committed [with gross negligence] [negligently] an act ordinarily lawful which might cause death]; and
>
> "2. The unlawful or negligent act was a cause of the death of another human being." (California Jury Instructions - Criminal, Instruction 8.90,
>
> as restated and discussed at length in Petitioner's Traverse at page 27:20 - 28:20.)

Because causation is in issue, each and every aforementioned factor pertaining to why the collision occurred was properly the subject of investigation. There could have been no detriment to Petitioner's defense by having had more information.

Petitioner further set forth, with regard to trial counsel's deficient performance at sentencing (the second basis for relief), the following objection:

Objection Number 9: Petitioner objects to the portion of the Report and Recommendation that sets forth that "[t]he testimony [of the deputy coroner] was admissible, there was no basis for an objection by counsel and Petitioner has failed to demonstrate prejudice."

This is a legally erroneous conclusion of law. As a fundamental aspect of California evidence law, there exists California Evidence Code, §352. California Evidence Code, §352, sets forth in full:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

California Evidence Code, §352, is clearly a basis for objection to testimony - such as the coroner's - where the occurrence of a death and the manner in which the death occurred are not in issue.

Lastly, and perhaps of greatest importance, is Petitioner's objection with regard to the Magistrate Judge's determination

regarding trial counsel's erroneous advice pertaining to the immigration consequences of Petitioner's plea. Specifically, Petitioner set forth as follows:

Objection Number 10: Petitioner objects to the portion of the Report and Recommendation finding that the trial court's admonition regarding the immigration consequences of Petitioner's plea cure counsel's erroneous advice to Petitioner regarding the same. Specifically, the Magistrate Judge concludes that "[a]ny error in [counsel's] advice was negated by the court's correct advice." (Report and Recommendation, page 22:5 - 6.)

In the course of the trial court's admonition, it was stated that Petitioner could "expect to be deported," however, it was also stated that "the area of law is somewhat in flux." In support of the Magistrate Judge's determination, the cases of *United States v. Thornton*, 23 F.3d 1532 (9th Cir. 1994) and *Doganiere v. United States*, 914 F.2d 165 (9th Cir. 1990) are cited. Both are cases which pre-date the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), both of which put "the area of law is somewhat in flux." As cited in Petitioner's Traverse, Petitioner had a right to rely on the advice of counsel. Petitioner's authorities are post-AEDPA and post-IIRIRA and explicitly deal with the issue of faulty advice of counsel in light of the sweeping changes to immigration law thereafter the said Acts. Accordingly, Petitioner's authorities should be controlling on the issue.

II.

A.

THE INSTANT APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE IS BROUGHT TIMELY PURSUANT TO 28 U.S.C., §2253.

28 U.S.C., §2253, states in pertinent part:

> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C., §2253 does not specify when the petitioner

should file the probable cause application. Notwithstanding, Petitioner brings the instant Application for Certificate of Appealability and Notice of Appeal within 30 days of the final order adopting the Report and Recommendation of the Magistrate Judge.

B.

PETITIONER SETS FORTH SUBSTANTIAL SHOWING OF DENIAL OF FEDERAL CONSTITUTIONAL RIGHT WITH REGARD TO TRIAL COUNSEL'S FAILURE TO INVESTIGATE PETITIONER'S ACTUAL SPEED AND POSSIBLE INVOLVEMENT OF THIRD PARTIES, ALL OF WHICH REASONABLE JURISTS WOULD DIFFER AS THE CONSTITUTIONAL IMPACT THEREOF

Petitioner's entire petition revolves around the federal constitutional right to effective assistance of counsel. (Grounds one through three of Petitioner's Petition for Writ of Habeas Corpus, United States Constitution, Sixth Amendment, cited in passim throughout Traverse.) The grounds for Petitioner's sought relief on prejudicial denial of effective assistance of counsel came forth pursuant to, in part, "prejudicial ineffective assistance of counsel for counsel's failure to investigate available and pertinent information regarding Petitioner's actual speed and the possible involvement of third parties" (a/k/a "Ground One").

The United States Magistrate Judge denied Petitioner's Petition for Writ of Habeas Corpus, in part, summarily denying the importance of investigation pertaining to Petitioner's actual speed and the possible involvement of third parties.[5] The bases

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5 In denying relief, the United States Magistrate Judge characterizes

set forth, and objection thereto, has been set forth, *supra*.

Here, Petitioner's trial counsel's complete failure to investigate the pertinent facts of the case - as set forth, ad nauseam, throughout Petitioner's Traverse - clearly makes a "substantial showing of the denial of a constitutional right." (*Barefoot v. Estelle*, 463 U.S. 880 (1983), as codified by 28 U.S.C., §2253(c).) Further, the importance of the investigation, given the California jury instructions by which the facts would be judged, constitutes a situation where "reasonable jurists would find the district court's assessment of the the constitutional claim debatable or wrong." (*Barefoot*, as cited by Hertz, *Federal Habeas Corpus Practice and Procedure*, (Lexis-Nexis 2002) Initiating the Appeal, §35.4b, page 1570 - 71, ftnt 21.)

Here, the district court's summary dismissal of investigation by virtue of Petitioner swerving into the bike lane was factually and legally correct. As set forth in the applicable

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Petitioner's presentation of third party involvement as levying "culpability" on third parties. Nowhere in the Traverse, or other pleading, does Petitioner seek to levy "culpability" on another party. It is the presence of third party factors - i.e., the two cars before Petitioner in traffic - to which Petitioner makes reference. Respectfully, the Magistrate Judge incorrectly read the claim. In the course thereof, the United States Magistrate Judge accused counsel for Petitioner of misstating the law and facts - an accusation which counsel takes with the utmost seriousness given the implication of misleading or attempting to mislead this Court. However, despite the accusation, nowhere does the Magistrate Judge draw reference to misstated law as set forth by Petitioner's counsel. The purported misstatement of "fact" goes to the debatable interpretation of the statements of one witness, Daniel Weber; a recitation that had evolved over the time Mr. Weber was interviewed by authorities with regard to this matter.

objections to the district court's finding, Petitioner's criminal culpability, or lack thereof, centered on the reasonableness of his conduct under the circumstances. As set forth in the objections, Petitioner's swerving into the bike lane was not "per se" negligent or illegal given the applicable law of the State of California. Specifically, California Criminal Jury Instruction Number 8.90 specifically contemplates that "which is dangerous to human life under the circumstances of its commission." Further, California Vehicle Code, §21209(a)(2), permits one to drive in the bicycle lane when entering or leaving the roadway. Here, Petitioner left the roadway so as to avoid collision with the two vehicles that were driving much slower just ahead of Petitioner.

Because the question of fact of reasonableness of Petitioner's conduct and the unresolved issue of Petitioner's actual speed were summarily rejected by the district court, those factors, as they relate to criminal culpability, are a matter upon which reasonable jurists may differ. As set forth, at length, throughout Petitioner's Traverse, there are many Ninth Circuit cases which place failure of trial counsel to investigate pertinent facts as a deprivation of the federal right of effective assistance of counsel.

C.

PETITIONER SETS FORTH SUBSTANTIAL SHOWING OF DENIAL OF FEDERAL CONSTITUTIONAL RIGHT WITH REGARD TO TRIAL COUNSEL'SFAILURE TO SEEK TO OBTAIN A PLEA BARGAIN, CHALLENGE THE ISSUE OF SPEED AS AN AGGRAVATING FACTOR AND FAILING TO OBJECT TO THE HIGHLY PREJUDICIAL EVIDENCE OF THE CORONER, ALL OF WHICH REASONABLE JURISTS WOULD DIFFER AS THE CONSTITUTIONAL IMPACT THEREOF

The issue regarding failure to investigate speed is set forth, supra. The basis for issuance of the Certificate of Appealability is identical with regard to failure to investigate in the guilt phase, as well as the sentencing phase, of proceedings as it relates to the issue of Petitioner's speed.

In accord with the requisites of *Barefoot, supra*, the district court's assessment of trial counsel's failure to object to the testimony of the deputy coroner is definitely the province of disagreement by reasonable jurists. Specifically, the district court adopted that portion of the Magistrate Judge's Report and Recommendation that set forth that "[t]he testimony [of the deputy coroner] was admissible, there was no basis for an objection by counsel and Petitioner has failed to demonstrate prejudice."

This determination is legally erroneous. As a fundamental aspect of California evidence law, there exists California Evidence Code, §352. California Evidence Code, §352, sets forth in full:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

California Evidence Code, §352, is clearly a basis for objection to testimony - such as the coroner's - where the occurrence of a death and the manner in which the death occurred are not in issue. Trial counsel's failure to object both failed to maintain a proper record for appeal and, most importantly, put the

sentencing court in a position of sentencing Petitioner in light of official testimony regarding matters that were nothing more than highly prejudicial. Everything to which the deputy coroner testified was not in issue and therefore the testimony had zero probative value.

Lastly, trial counsel's failure to even seek plea bargain "dove-tails" into the issue of speed as an aggravating factor. The district court's determination begs the issue in that there was never a plea bargain sought by trial counsel. Because trial counsel wholly failed to investigate the issue of speed and the circumstances of the incident, trial counsel was wholly unprepared to negotiate a plea bargain on behalf of Petitioner. As set forth in Petitioner's Traverse, this is a matter which has been held to constitute prejudicial ineffective assistance of counsel and upon which reasonable jurists may differ.

D.

PETITIONER SETS FORTH SUBSTANTIAL SHOWING OF DENIAL OF FEDERAL CONSTITUTIONAL RIGHT WITH REGARD TO TRIAL COUNSEL'S ERRONEOUS ADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF PETITIONER'S GUILTY PLEA, ALL OF WHICH REASONABLE JURISTS WOULD DIFFER AS THE CONSTITUTIONAL IMPACT THEREOF

The district court summarily dismissed the impact of trial counsel's erroneous advice to Petitioner regarding the immigration consequences of Petitioner's plea. Specifically, the Magistrate Judge concludes that "[a]ny error in [counsel's] advice was negated by the court's correct advice." (Report and Recommendation, page 22:5 - 6.)

In the course of the trial court's admonition, it was stated

that Petitioner could "expect to be deported," however, it was also stated that "the area of law is somewhat in flux." In support of the Magistrate Judge's determination, the cases of *United States v. Thornton*, 23 F.3d 1532 (9th Cir. 1994) and *Doganiere v. United States*, 914 F.2d [illegible] (9th Cir. 1990) are cited. Neither *Doganiere* nor *Thornton* regard immigration consequences. Further, both are cases which pre-date the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA). Both *Thornton* and *Doganiere* both regard trial counsel's failure to properly estimate or predict actual sentencing and, in the case of *Doganiere*, the parole consequences of a plea. The instant matter regards, not an estimation of what would occur, but affirmative misadvice that deportation would not occur.

The district court's determination that "[a]ny error in [counsel's] advice was negated by the court's correct advice" stands in clear contrast to the determination of the California Supreme Court in *In re Resendiz*, (2001) 25 Cal.4th 240. *Resendiz*, squarely addressing immigration consequences vis-a-vis judicial admonition, held that:

> "[T]hat the giving of an advisement under Pen. Code, [§]1016.5, does not bar a defendant who pleaded guilty from attacking his or her conviction on the ground that counsel provided inadequate advice concerning the consequences of the guilty plea. The court also held that a defendant who pleads guilty is not precluded from attacking his or her conviction on this basis, notwithstanding that immigration consequences

> are sometimes regarded as collateral, rather than direct, consequences of a conviction. That adverse immigration consequences may for certain due process purposes be collateral to the defendant's conviction should not preclude application of ordinary ineffectiveness standards to alleged immigration misadvice."

The *Resendiz* holding is proof that reasonable jurists may differ, and thereby the outcome of the petition may differ with that of what occurred in the instant case, in the sense of *Barefoot*, *supra*, and 28 U.S.C., §2253(c). As per the findings of the district court, Petitioner's trial counsel affirmatively misadvised Petitioner as to the immigration consequences of his plea and conviction. Specifically, the question upon which Petitioner intends to proceed on appeal is whether affirmative misadvice of trial counsel regarding post- AEDPA immigration consequences of a plea constitutes prejudicial ineffective assistance of counsel, notwithstanding judicial admonition.

III.

Conclusion

In accord with the objections previously filed with this Court and the points and authorities set forth herein, it is respectfully requested that this Honorable Court issue its certificate of appealability so as to take appeal from the Order Adopting the Findings, Conclusions, and Recommendations of United States Magistrate Judge and Judgment thereon.

Dated: January 7, 2003 s/ Anthony D. Zinnanti
ANTHONY D. ZINNANTI
Attorney for Petitioner,
MARCUS LELLAN

State of California)
) ss.
County of Los Angeles)

I, the undersigned, hereby certify that I am a citizen of the United States and over the age of 18; I work in the County of Los Angeles, California, which County the within service took place either by mail, facsimile or personally; and, I am not a party to the subject case. This firm's business address is 23822 W. Valencia Boulevard, Suite 304D, Valencia, California 91355-5302.

I am readily familiar with the rules and laws pertaining to the service of legal documents and pleadings via the United States Mails and other means of transmission.

On January 10, 2003, I made service of the documents, described as PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY (28 U.S.C., §2253) , by sending a true and correct copy of said document via United States Mail, postage pre-paid and addressed to:

Brad D. Levenson, Esq. / DAG
OFFICE FOR THE ATTORNEY GENERAL FOR
THE STATE OF CALIFORNIA
300 South Spring Street, Suite 500
Los Angeles, California 90013

I declare under the penalty of perjury and the laws of the State of California that the foregoing is true and correct.

Dated: January 10, 2003 s/ Anthony D. Zinnanti
Valencia, California Anthony D. Zinnanti

[File Stamp]
Filed
FEB 26 2003
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY s/ "JS" DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARCUS LELLAN, Petitioner, v. TOMMY E. VAUGHN, Warden, Respondent. _____/	Case No.: CV02-01375 HLH(mlg) ORDER DENYING CERTIFICATE OF APPEALABILITY

Petitioner Marcus Lellan, a state inmate, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. s. 2254. On January 8, 2003, this Court issued an order and judgment denying the petition. On February 10, 2003, petitioner filed a notice of appeal and a request for certificate of appealability. Because petitioner has failed to show that jurists of reason would find it debatable whether this Court was correct in its ruling, the Court denies petitioner's request for certificate of appealability.

Before Petitioner may appeal the court's dispositive decision denying his petition, a certificate of appealability must

issue. 28 U.S.C. s. 2253(c)(1)(A); Fed.R.App.P. 22(b). The Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. s. 2253(c)(3); Fed.R.App.P. 22(b).

The court reviews requests for certificates of appealability pursuant to *Slack v. McDaniel*, 529 U.S. 473 (2000), and 28 U.S.C. s. 2253(c).

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy s. 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, supra, 529 U.S. at 484.

Under this standard of review, a certificate of appealability should be denied. In denying the petition for writ of habeas corpus, this court found that the California state courts had not unreasonably applied, nor reached a decision contrary to, clearly established federal law in rejecting Petitioner's claims of ineffective assistance of counsel. Despite the vehemence and intensity of his arguments, Petitioner cannot make a colorable claim that jurists of reason would find debatable or wrong this Court's decision denying the petition. None of the state court decisions at issue in the petition could be viewed as error at all, much less "clear error." Thus, petitioner is not entitled to a certificate of appealability.

Therefore, pursuant to 28 U.S.C. s. 2253, the Court DENIES the request for certificate of appealability.

Dated: Feb. 21, 2003

s/ Harry L. Hupp
Honorable Harry L. Hupp
United States District Judge

Presented By:

s/ Marc L. Goldman
United States Magistrate Judge

Anthony D. Zinnanti, Esq.; SBN: 196778
LAW OFFICES OF ANTHONY D. ZINNANTI
23822 W. Valencia Boulevard, Suite 304D
Valencia, California 91355-5302
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FILED
CLERK, U.S. DISTRICT COURT
FEB 10 2003
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Attorney for Petitioner,
MARCUS LELLAN

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARCUS LELLAN, Petitioner,	Case Number: CV 02-01375-HLH (mlg)
v.	
TOMMY E. VAUGHN, in his capacity as Warden of Chuckawalla Valley State Prison,	NOTICE OF APPEAL [Filed concurrently with Petitioner's Application for Certificate of Appealability]
Respondent.	

_____/

TO THE COURT, THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Petitioner, MARCUS LELLAN, hereby notices his appeal from the final Order of the

United States District Court for the Central District of California denying [sic] adopting the Report and Recommendation of the Magistrate Judge and denying, with prejudice, Petitioner's Petition for Writ of Habeas Corpus.

LAW OFFICES OF ANTHONY D. ZINNANTI

Dated: February 10, 2003 s/ Anthony D. Zinnanti
ANTHONY D. ZINNANTI
Attorney for Petitioner,
MARCUS LELLAN

State of California)
) ss.
County of Los Angeles)

I, the undersigned, hereby certify that I am a citizen of the United States and over the age of 18; I work in the County of Los Angeles, California, which County the within service took place either by mail, facsimile or personally; and, I am not a party to the subject case. This firm's business address is 23822 W. Valencia Boulevard, Suite 304D, Valencia, California 91355-5302.

I am readily familiar with the rules and laws pertaining to the service of legal documents and pleadings via the United States Mails and other means of transmission.

On January 10, 2003, I made service of the documents, described as NOTICE OF APPEAL [Filed concurrently with Petitioner's Application for Certificate of Appealability], by sending a true and correct copy of said document via United States Mail, postage pre-paid and addressed to:

Brad D. Levenson, Esq. / DAG
OFFICE FOR THE ATTORNEY GENERAL FOR
THE STATE OF CALIFORNIA
300 South Spring Street, Suite 500
Los Angeles, California 90013

I declare under the penalty of perjury and the laws of the State of California that the foregoing is true and correct.

Dated: January 10, 2003 s/ Anthony D. Zinnanti
Valencia, California Anthony D. Zinnanti

FILED
MAY 07 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARCUS LELLAN,
Petitioner-Appellant,
v.
TOMMY E. VAUGHN, in his capacity as Warden of Chuckawalla Valley State Prison,
Respondent-Appellee.

No. 03-55375
D.C. No. CV-02-01375-HLH Central California (Los Angeles)

ORDER

_____/

Before: HUG and THOMAS, Circuit Judges.

The request for a certificate of appealability is denied. See 28 U.S.C. s. 2253(c)(2).

S:\RESEARCH\COA's\Orders\CL\June 2003\03-55375.wpd